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Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Golden West Broadcasters
(Assignor)

and File No. BAL-940503EA

KABC-AM Radio, Inc.
(Assignee)

For Assignment of License of
KMPC(AM), Los Angeles, California

MEMORANDUM OPINION AND ORDER

Adopted: December 30, 1994; Released: February 21, 1995

By the Commission:

1. The Commission has before it the above-captioned application for assignment of license of KMPC(AM), Los Angeles, California, from Golden West Broadcasters ("Golden West") to KABC-AM Radio, Inc., and a related request for waiver of 47 C.F.R. §73.3555(b), the Commission's one-to-a-market rule.[1] On June 1, 1994, the Commission received an informal objection to grant of the subject application from Thomas K. Van Amburg ("Van Amburg"). Van Amburg contends that the proposed assignment of license contravenes prior Commission rulings regarding ownership of local radio/television combinations by KABC-AM Radio, Inc.'s parent corporation, Capital Cities/ABC, Inc. ("Cap Cities"), as well as the "spirit and intent" of the Commission's radio ownership rule, 47 C.F.R. §73.3555(a)(1).[2]

2. KABC-AM Radio, Inc. is a wholly-owned subsidiary of Cap Cities, which also owns the corporate licensees of KABC(AM), KLOS(FM) and KABC-TV, all licensed to Los Angeles, California.[3] The Commission authorized Cap Cities to retain common ownership of these three stations in 1989 on the basis of Cap Cities' showing that the Los Angeles market satisfied the Commission's criteria for waiver of the one-to-a-market rule. *See Capital Cities/ABC, Inc.*, 4 FCC Rcd 5498 (1989); *see also In re Amendment of Section 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules ("Second Report and Order")*, 4 FCC Rcd 1741 (1989), *recon. granted in part and denied in part ("Second Report and Order Recon.")*, 4 FCC Rcd 6489 (1989). Because the Grade A contour of KABC-TV encompasses all of Los Angeles, grant of the above-captioned application requires waiver of the one-to-a-market rule.[4]

3. Cap Cities bases its waiver request on the one-to-a-market waiver standards adopted in the *Second Report and Order*. Under these criteria, the Commission presumptively favors waiver requests involving station combinations serving the top 25 markets where there are at least 30 separately owned, operated and controlled broadcast licensees or "voices" after the proposed combination ("top 25 market/30 voice standard"). *See* 47 C.F.R. §73.3555, n.7. It also favors requests involving "failed" broadcast stations, that is, stations that have not been operating for a substantial period of time, *e.g.*, four months, or that are involved in bankruptcy proceedings. *Id.* Other waiver requests are evaluated on a more rigorous case-by-case basis, as set forth in the *Second Report and Order*. While Cap Cities' waiver request meets the top 25 market/30 voice standard,[5] it nevertheless must be reviewed under the case-by-case standard because, as noted, the proposed assignment of license also relies upon the revised local radio ownership limits.[6] Under this standard, the Commission makes a public interest determination based upon the following criteria: (1) the potential public service benefits of joint operation of the facilities; (2) the types of facilities involved; (3) the number of media outlets owned by the applicant in the relevant market; (4) the financial difficulties of the stations involved; and (5) the nature of the relevant market in light

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[1] Section 73.3555(b) of the Commission's rules prohibits the common ownership of radio and television stations in the same market if the 2 mV/m contour of an AM station or the 1 mV/m contour of an FM station encompasses the entire community of license of a commonly-owned television station, or, conversely, if the Grade A contour of a television station encompasses the entire community of license of a commonly-owned AM or FM station. *See* 47 C.F.R. §73.3555(b).

[2] Van Amburg identifies himself as a member of a group of local broadcasters that unsuccessfully attempted to purchase KMPC(AM) from Golden West. Because Van Amburg's opposition was not served on the applicant and does not contain specific allegations of fact sufficient to show that Van Amburg is a party in interest, his opposition will be considered as an informal objection pursuant to Section 73.3587 of the Commission's rules. *See* 47 C.F.R. §73.3587.

[3] Cap Cities will hereafter be used to identify KABC-AM, Radio, Inc., as well as the licensees of KABC(AM), KLOS-FM, and KABC-TV.

[4] Because the principal community contours of KMPC(AM) and KABC(AM) overlap, Cap Cities must also meet the requirements of the local radio ownership rule found in Section 73.3555(a) of the Commission's rules. *See* 47 C.F.R. §73.3555(a)(1). Cap Cities demonstrates that there are at least 15 radio stations whose contours overlap the contours of the proposed commonly-owned stations. Because over 50 percent of principal community contour overlap of same service stations KABC(AM) and KMPC(AM) occurs within the Los Angeles, California radio metro market, as defined by Arbitron, Inc., Cap Cities supplies audience share data from the most recent Arbitron survey available from that market at the time the instant application was filed. *See* 47 C.F.R. §73.3555(a)(3)(iii). Those data show that the combined audience share of KABC(AM), KMPC(AM), and KLOS(FM) in the metro market is 7.0 percent, and therefore below the 25 percent audience share limit set forth in the rule.

[5] As set forth in paragraph 10, *infra.*, the Los Angeles media market is the country's second largest and contains 78 separate broadcast "voices."

[6] *See In re Revision of Radio Rules and Policies*, 7 FCC Rcd 6387, 6394, n.40 (1992); *see also Moosey Communications, Inc.*, 8 FCC Rcd 5247 (1993)(consideration of one-to-a-market waivers under the case-by-case standard still appropriate where new radio-TV combinations are created, pending the possible revision of the one-to-a-market rule in the outstanding TV ownership proceeding in MM Docket No. 91-221).

of the level of competition and diversity after the joint operation is implemented. *See Second Report and Order*, 4 FCC Rcd at 1753-54.

4. In support of its waiver request, Cap Cities submits a showing that addresses each of the five case-by-case factors.[7] Cap Cities first asserts that the proposed combination of KMPC(AM), KABC(AM), and KLOS(FM) will create efficiencies by combining management personnel, as well as news, programming, and production staffs. Cap Cities contends that savings will be realized by consolidating radio station sales offices, equipment sharing, and securing volume discounts on purchases of supplies and programming services.[8] Cap Cities also notes its intention to consolidate its Los Angeles radio operations at the existing facilities of KABC(AM) and KLOS(FM), reducing rent and utility expenses. With respect to benefits arising from its proposed ownership of KMPC(AM) and KABC-TV, Cap Cities maintains that although it intends to operate KMPC(AM) and KABC-TV separately, KMPC(AM)'s affiliation with KABC-TV will enable KMPC(AM) to avail itself of KABC-TV's experience in the local employment market, particularly KABC-TV's access to recruitment sources and knowledge of hiring conditions.[9] Cap Cities further maintains that KMPC(AM)'s affiliation with Cap Cities' ABC Radio Network and the radio network's affiliation with ABC Television Network news operations will strengthen the news gathering resources of both KMPC(AM) and KABC-TV. In sum, Cap Cities estimates projected savings of $5.8 million annually from the proposed combination.[10] With respect to related public service and programming benefits, Cap Cities notes its intention to institute a format at KMPC(AM) that would include enhanced public affairs programming analogous to that offered by KABC(AM), which Cap Cities indicates airs both daily public affairs programming and regular public service announcements.[11] Cap Cities further notes that combining KMPC(AM) with KABC(AM) would enable KMPC(AM) to avail itself of KABC(AM)'s community relations department, which Cap Cities notes has received numerous awards for outstanding public service.

5. Second, regarding the technical facilities involved, Cap Cities affirms that KABC-TV is a VHF television station operating on Channel 7 with 141 kW effective radiated power ("ERP") and an antenna height of 3210 feet above average terrain ("HAAT"). KLOS(FM) is a Class B FM station operating on Channel 238 (95.5 MHz) with 50 kW ERP and an antenna height of 1200 feet HAAT. KABC(AM) is a Class B AM station operating full time on 790 kHz with a power of 5 kW using a directional antenna system during nighttime hours only. KMPC(AM) is a Class B AM station operating full time on 710 kHz with a power of 50 kW during daytime hours and 10 kW during nighttime hours using a directional antenna system during nighttime hours only. In support of its contention that the subject facilities do not dominate the market, Cap Cities notes the presence of six other VHF television stations in the Los Angeles market, as well as at least three other Class B FM stations and eleven AM stations with facilities comparable to KABC(AM) and KMPC(AM).

6. Third, with respect to the number of other media outlets the applicant already owns in the relevant market, Cap Cities affirms it does not own any broadcast stations in the Los Angeles market other than KABC-TV, KLOS(FM), and KABC(AM). As previously noted, Cap Cities demonstrates that for purposes of the Commission's local radio ownership rule, there are at least 15 radio stations whose contours overlap the proposed commonly-owned radio stations and that the combined audience share of KLOS(FM), KABC(AM), and KMPC(AM) in the Los Angeles metro market is 7.0 percent. *See* note 4, *supra*.

7. Fourth, with regard to the economic status of the stations involved in the proposed combination, Cap Cities and Golden West state that KMPC(AM) sustained operating losses of $3.4 million in 1991, approximately $6.5 million in 1992, and $6.9 million in 1993. Cap Cities and Golden West also indicate that KMPC(AM)'s losses continued at a similar rate in 1994, and note that the station continued to sustain losses notwithstanding Golden West's implementation of a new program format in 1992.

8. The fifth factor relates to the nature of the relevant market in light of the Commission's concerns about diversity and competition. Relevant indicia include the number of broadcast outlets, the number of separately-owned and operated "voices" in the market, and the presence of cable and non-broadcast media. As to the number of broadcast stations, the Commission has held that, in the context of a one-to-a-market waiver, it will consider the "relevant TV metro market for radio stations and the relevant ADI [Area of Dominant Influence] TV market for TV stations." *See Second Report and Order*, 4 FCC Rcd at 1760, n. 101. Cap Cities represents that the Los Angeles ADI is ranked 2nd in the country and contains 32 AM stations, 36 FM stations, 24 TV stations, and over 30 daily newspapers. Cap Cities further represents that the broadcast stations in the market are owned and operated by 73 different "voices." Additionally, Cap Cities notes that the Los Angeles market is served by 126 separate cable systems having a penetration rate of 59 percent, and that over 81 percent of households have VCRs. Cap Cities argues that viewpoint diversity in Los Angeles exceeds that of any other market in the United States, and that the Los Angeles market has a greater number of independent broadcast "voices" than markets in which the Commission has recently granted requests for waiver of the one-to-a-market rule under the case-by-case factors.[12]

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[7] It should be noted that "[n]ot all of the factors mentioned will be relevant in every case." *See Second Report and Order Recon.*, 4 FCC Rcd at 6491, para. 18.

[8] Cap Cities also observes that KMPC(AM) would realize the benefits of Cap Cities' corporate personnel, financial, accounting, engineering, and legal services currently provided to each of its Los Angeles broadcast stations.

[9] Cap Cities cites the Commission's decision in *Guy Gannett Publishing Co.*, 7 FCC Rcd 1787 (1992), in support of its contention that the Commission recognizes that, in evaluating requests for waiver of the one-to-a-market rule, efficiency benefits may result from common ownership of radio and television stations in the same market even if the stations will be operated separately.

[10] Cap Cities estimates that annual savings would include $1.7 million in personnel costs, $367,000 in rent and utility expenses, and $175,000 in programming expenses such as ratings service subscriptions and association dues.

[11] Cap Cities asserts that, under its ownership, KMPC(AM) would air a talk radio format complementing that aired by KABC(AM), which Cap Cities notes airs regular programming addressing issues facing the Los Angeles community.

[12] In support of its contentions, Cap Cities cites recent Commission actions granting one-to-a-market rule waivers in

9. Van Amburg asserts that he offered to purchase KMPC(AM) from Golden West for $15 million, $2.5 million less than the purchase price agreed upon between Golden West and Cap Cities. Van Amburg contends that had the Commission enforced its previous rulings, which originally required Cap Cities to divest itself of radio station ownership in markets in which it also owns television stations, Cap Cities would be otherwise precluded from increasing its radio ownership in the subject market.[13] Van Amburg further contends that radio ownership rules permitting common ownership of same-market radio stations conferred an "unfair advantage" on Cap Cities in structuring its offer to purchase KMPC(AM) by enabling Cap Cities to base it valuation of the radio station on projected joint operating efficiencies unavailable to prospective buyers such as Van Amburg who own no other media outlets in the market.

10. *Discussion.* In evaluating a request for waiver of the one-to-a-market rule, the Commission's goal "is to permit the public to benefit from such efficiencies of operation as may be achieved through the use of common facilities and staff, consistent with the maintenance of diversity and vigorous competition within the market areas involved." *See Second Report and Order Recon.*, 4 FCC Rcd at 6491. We conclude that Cap Cities' showing in support of a waiver of the one-to-a-market rules meets the Commission's case-by case criteria, and that a waiver in this instance is consistent with the public interest and would not have an adverse effect on diversity and competition in the Los Angeles market.[14] Cap Cities has shown that common ownership of KMPC(AM), KABC(AM), KLOS(FM), and KABC-TV will create efficiencies resulting in significant cost savings and the potential for enhanced programming and service benefits.[15] In particular, joint operation of KMPC(AM) and KABC(AM) will enable KMPC(AM) to avail itself of KABC(AM)'s public affairs programming and community relations department, resources that could enhance KMPC(AM)'s ability to air public service and public affairs programming, as well as its ability to assess the needs of listeners in the Los Angeles community. Additionally, the affiliation of KMPC(AM) with Cap Cities' ABC Radio Network and the radio network's affiliation with ABC Television Network news operations could strengthen the news gathering resources of KMPC(AM), enabling KMPC(AM) to better serve its community. Moreover, Cap Cities affirms that the proposed combination enhances prospects for profitable operation of KMPC(AM), which Cap Cities and Golden West note has incurred operating losses during each of the past three years under its present ownership. Cap Cities also demonstrates that the proposed combination will not create any undue concentration of ownership or control of broadcast media in the Los Angeles market, which comprises the country's second largest ADI. Following the proposed acquisition of KMPC(AM), the market will be served by 67 radio stations and 26 television stations.[16] Those 93 stations will be owned and operated by 78 separate entities.[17] Other "voices" in the market include at least four major daily newspapers and cable television, which has a penetration rate of 58.9 percent. While the technical facilities of the stations involved are significant, we note that the proposed combination does not present issues of market concentration inconsistent with the public interest given the highly competitive environment in the Los Angeles market, both in terms of the number of other broadcast stations and the relevant market shares of the stations involved in this transaction.[18] Thus, we are persuaded that the public benefits of common ownership and joint operation of KMPC(AM), KABC(AM), KLOS(FM), and KABC-TV outweigh any negative effect on diversity and competition in the Los Angeles market that the combination might engender. As Cap Cities observes, the Commission has granted waivers of the one-to-a-market rule under similar circumstances. *See* note 12, *supra.*

11. We find no merit to Van Amburg's contention that the Commission's "failure" to enforce prior divestiture conditions with respect to Cap Cities' ownership of radio

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KVI(AM), 9 FCC Rcd 1330 (1994); *BREM Broadcasting*, 9 FCC Rcd 1333 (1994); and *Moosey Communications, Inc.*, 8 FCC Rcd 5247 (1993).

[13] In 1985, the Commission approved the merger of Capital Cities Communications and American Broadcasting Companies, Inc., and granted a temporary waiver of the one-to-a-market rule to permit the new entity to retain common ownership of KABC(AM), KLOS(FM), and KABC-TV for a period of 18 months following consummation of the merger. *Capital Cities Communications, Inc.*, 59 RR 2d 451 (1985). Prior to the required divestiture date, however, the Commission instituted a rulemaking proceeding in which it proposed to amend the multiple ownership rules and permit common ownership of television and radio stations in the larger television markets. *See In re Amendment of Section 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules*, 2 FCC Rcd 1138 (1987). In view of the then-pending rulemaking, Cap Cities requested that the Commission extend the divestiture requirement for a period of up to six months after the effective date of the Commission's action in that proceeding. *See Capital Cities/ABC, Inc.*, 2 FCC Rcd 2539 (1987). Cap Cities subsequently availed itself of the "top 25 market/30 voice standard" for one-to-a-market rule waivers adopted by the Commission in the *Second Report and Order* in order to retain ownership of the subject stations. *See Capital Cities/ABC, Inc.*, 4 FCC Rcd 5498 (1989).

[14] Our conclusion takes into account the public interest in a strengthened radio service made possible by waiver of the one-to-a-market rule in this case. *See In re Revision of Radio Rules and Policies*, 7 FCC Rcd at 6394, n.40.

[15] Notwithstanding its contention that the proposed combination would result in projected savings of $5.8 million annually, Cap Cities only identifies specific savings of $2.24 million. *See* note 10, *supra*. We nonetheless find the projected savings to be significant.

[16] Although Cap Cities relies upon March 1989 data concerning the number of broadcast outlets and independent "voices" in the Los Angeles market, we find that the market continues to be sufficiently diverse notwithstanding ownership and facilities changes during the intervening five years. *See Broadcasting & Cable Yearbook* (1994); *see also M Street Radio Directory* (1995). Our conclusion, however, does not excuse applicants from their obligation to document waiver showings with information most recently available at the time of filing of their applications.

[17] Notwithstanding Cap Cities' assertion that following the proposed transaction the Los Angeles market would be served by 92 broadcast stations owned and operated by 73 separate entities, analysis by the Commission's staff indicates that following the transaction the relevant market will be served by 93 broadcast stations owned and operated by 78 separate entities.

[18] As documented by Cap Cities, in the Winter 1994 Arbitron Local Market Report for the Los Angeles Survey Area, KMPC(AM) was tied for a ranking of thirty-fifth with a 0.5 share, KABC(AM) ranked fifth with a 3.8 share, and KLOS(FM) ranked sixteenth with a 2.7 share. *See KVI, Inc.*, 9 FCC Rcd 1330, n.8 (1994).

stations in the Los Angeles market should preclude the proposed acquisition. As previously indicated, the Commission authorized Cap Cities to retain common ownership of KABC-TV, KABC(AM), and KLOS(FM) following a 1985 merger between Capital Cities Communications, Inc. and American Broadcasting Companies, Inc., on the basis of Cap Cities' prior showing that the proposed combination qualified for waiver of the one-to-a-market rule under the "top 25 market/30 voices" waiver standard adopted by the Commission in 1989. *See* note 13, *supra*. Van Amburg's contention that operating efficiencies available to multiple station owners such as Cap Cities enable such owners to value radio stations within their respective markets higher than prospective owners who do not currently own a station in the relevant market may be true, but we do not see this as a reason to deny this waiver request. Rather, as explained above, in this context, where there will be 77 other "voices" in the market following the proposed sale of KMPC(AM), we find the efficiencies created by this combination will result in tangible public service benefits. Indeed, in both the one-to-a-market rulemaking proceeding and the radio ownership rulemaking proceeding, the Commission expressly determined that combinational efficiencies derived from common ownership of radio and television stations in local broadcast markets and from common ownership of same service radio stations in local markets were presumptively beneficial and would strengthen the competitive standing of combined stations, a circumstance that would enhance the quality of viewpoint diversity by enabling such stations to invest additional resources in programming and other service benefits provided to the public. As noted, Cap Cities has demonstrated that its proposed ownership of radio stations in the Los Angeles market complies with the Commission's radio ownership rules in all relevant respects, and Van Amburg has submitted no evidence to the contrary.[19]

12. Accordingly, IT IS ORDERED, That the informal objection to grant of the above-captioned application filed by Thomas K. Van Amburg IS DENIED. Further, the request for a waiver of the Commission's one-to-a-market rule, 47 C.F.R. §73.3555(b), IS HEREBY GRANTED, and, having found the parties thereto otherwise qualified, the application (BAL-940503EA) for assignment of license of KMPC(AM), Los Angeles, California, from Golden West Broadcasters to KABC-AM Radio, Inc. IS HEREBY GRANTED.[20]

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[19] With respect to Van Amburg's contention that he should be provided the opportunity to purchase KMPC(AM), we note that Section 310(d) of the Communications Act of 1934, as amended, provides, in relevant part, that in acting on any application for assignment of license the Commission may not consider whether the public interest, convenience, and necessity might be served by the assignment of the license to a person or entity other than the proposed assignee. *See* 47 U.S.C. §310(d). Consequently, in the present case, we are precluded from considering the qualifications of anyone other than Cap Cities.

[20] In response to Question 14 of Assignee's section of the above-captioned application for assignment of license, Capital Cities/ABC, Inc. has reported a decision in *Shepard v. American Broadcasting Companies, Inc.*, No. 88-954, (Memorandum Opinion and Order, D.D.C. April 15, 1992), *motion for reconsideration granted in part and denied in part*, (Memorandum Opinion and Order, September 3, 1993), *judgment further modified*, (Memorandum Opinion in Support of Final Judgment, June 13, 1994), *notice of appeal docketed*, July 7, 1994, constituting an adverse finding or adverse final action "taken by any court . . . with respect to the applicant or parties to this application in a civil . . . proceeding, brought under the provision of any law related to . . . fraudulent statements to another governmental unit . . . ." The *Shepard* decision, which includes findings of litigation-related misconduct against Cap Cities' subsidiary American Broadcasting Companies, Inc., is presently under appeal. Our action here granting the above-captioned application is without prejudice to whatever action, if any, the Commission may deem appropriate in connection with the *Shepard* findings, which are presently under review in connection with pending applications for renewal of license filed by Cap Cities and its subsidiaries.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-139

In the Matter of

Amendment of Section 73.202(b),	RM-7149
Table of Allotments,	RM-7484
FM Broadcast Stations.	
(Oshkosh, Winneconne & Townsend,	
Wisconsin and Menominee, Michigan)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 10, 1995; Released: February 21, 1995

By the Chief, Allocations Branch:

1. At the request of Value Radio Corp. ("Value") and CJL Broadcasting, Inc. ("CJL"), the Commission has before it for consideration a *Notice of Proposed Rule Making*, 5 FCC Rcd 1763 (1990). Value proposes the substitution of Channel 280C3 for Channel 280A at Oshkosh, Wisconsin, the change of the community of license from Oshkosh to Winneconne, Wisconsin, and the modification of the license for Station WMGV(FM) to specify operation on Channel 280C3 at Winneconne. CJL requests the substitution of Channel 279C3 for Channel 280A at Menominee, Michigan, and modification of the license for Station WCJL-FM at Menominee to specify the higher powered channel.[2] Value and CJL filed joint comments. Independence Broadcasting Wisconsin Corp. ("Independence") filed a counterproposal.[3] A counterproposal was also filed by WinCom Wisconsin Limited Partnership ("WinCom").[4] On August 28, 1992, Independence withdrew its counterproposal in compliance with Section 1.420(j) of the Commission's Rules. No further consideration will be given to the allotment of an FM channel at Townsend. Good Neighbor Broadcasting, Inc. ("Good Neighbor") submitted supplemental comments.[5]

2. After consideration of the information filed in this proceeding, we believe the public interest would be served by the substitution of Channel 280C3 for Channel 280A at Oshkosh, Wisconsin, a change of community of license from Oshkosh to Winneconne, Wisconsin, and modification of the license for Station WMGV(FM) to specify operation on Channel 280C3 at Winneconne. Value has shown that reallotment of the channel from Oshkosh to Winneconne will result in a preferential arrangement of allotments. Winneconne (population 2,059)[6] will receive its first local service. In addition, Oshkosh (population 57,000) will continue to be served by Stations WOSH(AM), WXOL(AM), WUSW(FM) and WRST-FM.[7] Value has specified a new transmitter site for Station WMGV(FM) that is located outside the Oshkosh urbanized area. The reallotment from Oshkosh to Winneconne will move Station WMGV(FM) from an urban to a rural community. An engineering analysis indicates that both the loss area for Oshkosh and the gain area for Winneconne are completely covered by at least five full-time reception services, and are, therefore, considered to be well served areas. The loss area for Channel 280A at Oshkosh contains 21,561 people and covers approximately 256 square miles while the gain area for Channel 280C3 at Winneconne contains 106,339 people and covers approximately 1,240 square miles. Further, from Value's selected site, primary service will be provided to the entire community of Oshkosh by Station WMGV(FM). Channel 280C3 can be allotted to

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[1] The community of Townsend has been added to the caption.

[2] At the time this proposal was filed, CJL Broadcasting, Inc. was the licensee of Station WCJL-FM, Menominee. An assignment of the license to Good Neighbor Broadcasting, Inc., was granted on May 15, 1992, and consummated on June 25, 1992. On August 31, 1992, the Commission modified the call sign of Station WCJL-FM to "WHYB."

[3] Public Notice of the counterproposal was given on September 5, 1990, Report No. 1825 (RM-7484). Independence requested the allotment of Channel 278C3 to Townsend, Wisconsin, as that community's first local service.

[4] In its comments and counterproposal, WinCom states that petitioner's proposal is short-spaced to its counterproposal filed in MM Docket No. 89-486 in which WinCom proposed the allotment of Channel 295C3 to Ashwaubenon, Wisconsin. To accommodate Channel 295C3 at Ashwaubenon, WinCom notes that it is necessary to substitute Channel 279A for Channel 296A at Oconto, Wisconsin. Channel 279C3, Menominee, Michigan, is short-spaced to Channel 279A at Oconto, Wisconsin. WinCom notes that the Commission's staff has not placed its counterproposal in MM Docket 89-486 on public notice. WinCom believes that the absence of public notice is an oversight and, therefore, resubmits the counterproposal in this proceeding in order to protect the allotments proposed as a part of the MM Docket 89-486 proceeding.

The Menominee substitution is not in conflict with WinCom's filing in MM Docket 89-486, as WinCom's counterproposal was never accepted in that proceeding. In the *Report and Order* in MM Docket 89-486, 6 FCC Rcd 7142 (1991), we stated that WinCom's counterproposal was unacceptable because it constituted an untimely counterproposal when initially filed and could not be considered in the context of the proceeding. Furthermore, WinCom's proposed Kaukauna channel allotments required three substitutions of existing channels which violated the Commission's policy on the number of channel substitutions in an allotment proceeding. Therefore, acceptance of the proposal presented herein was not proper. WinCom filed a Petition for Reconsideration of the *Report and Order* in MM Docket No. 89-486. On September 2, 1993, WinCom filed a request to withdraw its Petition for Reconsideration. A *Memorandum Opinion and Order* was adopted December 9, 1993, and released December 30, 1993, granting its request. As a result, we need not consider WinCom's counterproposal or petitioner's responsive comments.

[5] These comments, which advise us of the recent assignment of the license of Station WHYB from CJL Broadcasting, Inc. to Good Neighbor Broadcasting, Inc., were not accompanied by a motion to accept. However, since the comments simply reaffirm Good Neighbor's continuing interest in pursuing the modification proposal initiated by CJL, no prejudice will ensue from their acceptance.

[6] The population figures were taken from the 1990 census.

[7] Station WRST-FM, Channel 212A, is licensed to the Board of Regents, University of Wisconsin System.

Winneconne in compliance with the Commission's minimum distance separation requirements at the site specified by Value.[8] In accordance with the provisions of Section 1.420(g) and (i) of the Commission's Rules, we will modify the license for Station WMGV(FM) to specify Winneconne, Wisconsin, as its community of license on Channel 280C3 in lieu of Channel 280A at Oshkosh, Wisconsin. As requested by CJL and Good Neighbor, we will substitute Channel 279C3 for Channel 280A at Menominee, Michigan. Channel 279C3 can be substituted for Channel 280A at Menominee consistent with the Commission's technical requirements.[9] Canadian concurrence has been received for the allotment of Channel 279C3 at Menominee. In accordance with Section 1.420(g) of the Commission's Rules, we shall modify the license for Station WHYB to specify operation on Channel 279C3 in lieu of Channel 280A.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 7, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below, to read as follows:

Community	Channel No.
Menominee, Michigan	279C3
Oshkosh, Wisconsin	245A
Winneconne, Wisconsin	280C3

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station WMGV(FM), Oshkosh, Wisconsin, IS MODIFIED to specify operation on Channel 280C3 in lieu of Channel 280A at Winneconne, Wisconsin, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the License of Station WHYB, Menominee, Michigan, IS MODIFIED, to specify operation on Channel 279C3 in lieu of Channel 280A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (FCC Form 301) specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620 of the Commission's Rules.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental im- pact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That the counterproposal filed by Independence Broadcasting Wisconsin Corp. (RM-7484) IS DISMISSED.

7. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following:

Stanley S. Neustadt
Cohn and Marks
1333 New Hampshire Ave., N.W. Suite 600
Washington, D.C. 20036
(counsel for WinCom Wisconsin Limited Partnership)

Malcolm G. Stevenson
Swartz, Woods & Miller
1350 Connecticut Ave., N.W. Suite 300
Washington, D.C. 20036
(counsel for Independence Broadcasting Wisconsin Corp.)

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[8] The coordinates for Channel 280C3 at Winneconne are 44-15-09 and 88-44-48.
[9] The coordinates for Channel 279C3 at Menominee are 45-06-21 and 87-46-43.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of the Commission's
Rules of Practice and Procedure

ORDER

Adopted: January 3, 1995; Released: February 21, 1995

By the Commission:

1. On September 26, 1994, Multinational Legal Services, P.C. (MLS) filed a Petition for Reconsideration or Clarification of the Commission's *Order*, FCC 94-210, released August 24, 1994, 59 Fed. Reg. 44340 (1994), by which the Commission promulgated new section 1.7 of its Rules, 47 C.F.R. § 1.7. In adopting section 1.7, the *Order* formalized a Commission practice of accepting documents as filed when they are received at a location designated by the Commission. The *Order* may have created some confusion, and to address this, we grant MLS's petition and clarify the language of section 1.7.

2. In its petition, MLS argues that section 1.7 may create uncertainty about the filing deadline for time-critical applications at the lockbox facility of the Mellon Bank in Pittsburgh, Pennsylvania. In accordance with procedural rules adopted in connection with our fee collection program, applications submitted to the lockbox facility by the next business day after an official filing deadline are considered timely filed.[1] This procedural rule allowing additional time is not, however, codified in the Code of Federal Regulations. MLS notes that this rule may therefore conflict with the newly promulgated section 1.7 which states that:

> Unless otherwise provided in this Title [47], pleadings and other documents are considered to be filed with the Commission upon their receipt at the location designated by the Commission.

3. To avoid potential confusion, we will adopt MLS's recommendation (with one minor change) and clarify section 1.7 by including language stating that, unless otherwise provided in this Title, by Public Notice, or by decision of the Commission or Commission staff acting on delegated authority, documents are deemed filed when they are received by the Commission.

4. In view of the foregoing and pursuant to the authority contained in sections 4(i), 4(j), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), and 303(r), IT IS ORDERED THAT the Petition for Reconsideration or Clarification filed by Multinational Legal Services, P.C. IS GRANTED.

5. IT IS FURTHER ORDERED that Part 1 of the Commission's Rules IS AMENDED in the manner indicated in the Appendix, to be EFFECTIVE upon publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX

Part 1 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

PART I Practice and Procedure

1. The authority citation for Part 1 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 503(b)(5); 5 U.S.C. 552; 21 U.S.C. 853a, unless otherwise noted.

2. Section 1.7 is revised to read as follows:

§ 1.7 Documents are filed upon receipt

Unless otherwise provided in this Title, by Public Notice, or by decision of the Commission or of the Commission's staff acting on delegated authority, pleadings and other documents are considered to be filed with the Commission upon their receipt at the location designated by the Commission.

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[1] *Fee Collection Program*, 5 FCC Rcd 3558, 3565 (1990); *Public Notice, Filing of Time Critical Feeable Applications*, 67 Rad. Reg (P&F) 2d 1127 (1990); *see GAF Broadcasting Company*, 8 FCC Rcd 1742, 1744 (Aud. Serv. Div. 1993) (application received at the lockbox facility the day after the official deadline considered timely filed).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-17

In the Matter of

Amendment of Parts 73 and 74 of the Commission's Rules to More Effectively Protect Radio Astronomy Activity on Channel 37 — RM-8109

NOTICE OF PROPOSED RULE MAKING

Adopted: January 27, 1995; Released: February 21, 1995

Comment Date: March 31, 1995
Reply Comment Date: April 21, 1995

By the Commission:

INTRODUCTION

1. We hereby propose a number of actions designed to protect radio astronomy operations on Channel 37 of the UHF television broadcasting band. Specifically, we propose to amend Parts 73 and 74 of our rules to include the geographical coordinates of thirteen radio astronomy sites where TV Channel 37 frequencies (608 - 614 megahertz) are used for radio astronomy observations. We also propose a means by which such sites may be protected from interference by television stations operating on Channels 36 and 38. We further propose that the one currently authorized TV station which does not provide the proposed protection would be allowed to continue operating with its authorized facilities, but would not be allowed to increase its field strength in the direction of the affected radio astronomy site. Finally, we propose to delete one vacant TV allotment that is located near one of the radio astronomy sites.

BACKGROUND

2. In 1963, the Commission adopted a *Report and Order* which reserved TV Channel 37 exclusively for radio astronomy service for a period of ten years.[1] This reservation was continued and finally made permanent through a number of actions taken from 1975 to 1986.[2] Footnote US74 in Section 2.106 of the Commission's Rules states in part that "the radio astronomy service shall be protected from extraband radiation only to the extent that such radiation exceeds the level which would be present if the offending station[3] were operating in compliance with the technical standards or criteria applicable to the service in which it operates." Thus, a radio astronomy site is afforded only limited and uncertain protection by the rules. Our rules do not identify the locations of radio astronomy operations using Channel 37, which prevents TV station applicants from considering these operations as they design their proposed TV facilities. As a result, the Commission could properly but inadvertently authorize TV facilities at locations closer to radio astronomy observation sites than may be desirable.

3. To prevent such actions in the future, the National Academy of Sciences' Committee on Radio Frequencies (CORF) petitioned the Commission to amend the rules to include the locations of thirteen radio astronomy sites that currently or will make use of Channel 37, to adopt an 87.7 kilometer (54.5 mile) separation requirement applicable to adjacent channel television stations and to delete Channel 38 at Hilo, Hawaii, from the TV Table of Allotments.[4]

DISCUSSION

4. In its petition at page 4, CORF, citing Commission statements and rules, argues that radio astronomy operations are entitled to protection equivalent to that enjoyed by a television station operating on a UHF-TV channel, including an explicit distance separation requirement. We disagree. We believe the proper construction to be placed on the proceedings and rules cited by CORF in its petition is that, while radio astronomy facilities will be authorized to exclusively use Channel 37, no protection from adjacent channel TV transmissions will be provided, other than what results from regulatory limitations on TV station facilities and out-of-band emissions.

5. While we do not agree with CORF's argument that our past decisions entitle radio astronomy use of Channel 37 to site protection, we nevertheless believe that CORF's proposal merits consideration. We wish to examine whether some additional protection can be afforded to radio astronomy sites without significant adverse impact on broadcast services. We recognize that the sensitivity of radio astronomy equipment today is undoubtedly much greater than it was in 1963. Obtaining full benefit from radio astronomy studies may be facilitated by new precautions intended to limit the generation of man-made emissions on Channel 37 in the vicinity of the designated radio astronomy sites. We also note that the identified radio astronomy locations are mostly in rural areas. We seek comment on whether TV spectrum is scarce in any of these areas, either for the existing TV service or considering the new advanced TV service that we are proposing in MM Docket No. 87-268.

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[1] *Report and Order*, Docket No. 15022, 39 FCC 884 (1963).

[2] *Order*, 53 FCC 2d 627 (1975) (Channel 37 reservation extended through WARC-79); *Second Report and Order*, Gen. Docket No. 80-739, 49 Fed. Reg. 2357 (January 19, 1984) (amending Footnote US 246 to the U.S. Table of Frequency Allocations to implement domestically the WARC-79 reallocation of Channel 37 to the radio astronomy service); *Order*, Mimeo 4385 (released May 12, 1986) (amending §73.603(c) to reflect this reallocation).

[3] Because no stations of any type are authorized on Channel 37 the term "offending station" should be construed as a reference to stations operating on adjacent Channels 36 and 38.

[4] The Hilo allotment, at 39.3 kilometers (24.4 miles) from the Mauna Kea radio astronomy facility, is within the requested separation distance.

6. We also request comments on an alternative approach which is functionally equivalent to the one advocated by CORF but which is more flexible than a fixed distance separation requirement and thus less burdensome to broadcasters. As set forth in Appendix A, we propose to set a limit on the field strength that a TV station on Channel 36 or 38 could produce at the coordinates of radio astronomy sites designated by CORF. This alternative would not include a distance separation requirement. Basing the proposed protection on field strength will permit stations to be located closer to the radio astronomy sites than the fixed distance separation would allow, if the signal radiated toward the radio astronomy site is suppressed by an appropriate amount.

7. In accordance with Section 73.614 of our rules, a full service UHF TV station can have a peak visual effective radiated power (ERP) of 5 megawatts (MW) at an antenna height above average terrain (HAAT) of 610 meters (2,000 feet). These facilities would deliver a field strength of approximately 72 dBu at 87.7 kilometers.[5] However, we believe that CORF may not have intended to imply that a 72 dBu field strength restriction would provide adequate protection. A lower field strength value is more consistent with the power and antenna height at which UHF-TV stations typically operate. Rather than using maximum allowable facilities, a more typical UHF station has an ERP between 1 and 5 MW and an antenna HAAT in the vicinity of 350 meters (1150 feet). These facilities produce a field strength of 57 to 64 dBu at 87.7 kilometers. We propose to use 64 dBu as the limit on the field strength that a Channel 36 or 38 TV station is permitted to produce at a radio astronomy site.

8. Another concern leads us to propose the 64 dBu value in lieu of 72 dBu. The frequency band that might receive interference is actually in the adjacent Channel 37. An applicant for a TV station requesting use of a directional antenna specifies the radiation pattern it will employ for its on-channel performance; however, a directional antenna is frequency sensitive and may produce a different pattern for any energy it may radiate on adjacent channels. Therefore, this fact suggests we should adopt a relatively conservative field strength value for purposes of radio astronomy site protection.

9. We propose to apply the same field strength limit to low power TV stations, TV translators and TV boosters. Since such stations operate with significantly smaller facilities than full service UHF-TV stations, our proposed approach would permit them much greater flexibility in terms of location, while providing the radio astronomy sites a level of protection equal to that provided by the more powerful full service stations. Compliance with the field strength restriction would be determined using the standard prediction methods and the Commission's F(50,50) propagation curves. Comments should address whether 72 dBu, 64 dBu or some other field strength value provides adequate protection for the Channel 37 radio astronomy operations and whether these values impose a significant burden on TV use of these two channels. Parties that favor a fixed separation distance as proposed by CORF should identify the distance they believe is correct and support their choice.

10. CORF also indicates that it does not oppose the Commission's "grandfathering" of existing stations and stations for which a construction permit has been authorized on Channels 36 and 38. CORF requests that extension or reinstatement of expired construction permits be conditioned upon using a different channel.[6] CORF urges the Commission to require applicants for new stations on Channel 36 or 38 to amend their applications to specify a different channel, if feasible.

11. We do not believe that action on CORF's proposed "grandfathering" provision is necessary. A review of Commission records indicates that only one full service TV station currently operates with facilities that produce a predicted field strength in excess of 64 dBu at any of the identified radio astronomy sites. WJWN-TV, Channel 38, San Sebastian, PR, is licensed at an ERP of 85.1 kW and HAAT of 332 meters (m). At 90 degrees True, which is toward the Arecibo radio astronomy site, the WJWN-TV facilities are 85.1 kW at 232 m. With the distance between sites of 45.1 kilometers (km), the predicted field strength at the radio astronomy facility is 67 dBu. While no other station currently authorized on Channels 36 or 38 would exceed the proposed field strength of 64 dBu, there are three other full service stations that would be precluded from increasing to the maximum normally permitted facilities by adoption of the proposed protection standard.[7]

12. In light of the preceding discussion, we believe that a general grandfathering provision, covering any existing or proposed facilities, is unnecessary. We propose to consider the WJWN-TV situation discussed above as a waiver of the proposed rule. WJWN-TV would not be permitted to modify its facilities in such a way as to increase its predicted field strength at the Arecibo radio astronomy site. We

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[5] All field strength calculations used in this *Notice* are derived using the Commission's F(50,50) propagation curves and refer to the field strength of the TV signal on the assigned frequency.

[6] CORF petition, p. 15.9

[7] KQCT (TV), on Channel 36 in Davenport, IA, is 87.1 km (54.1 miles) from the North Liberty, IA radio astronomy facility. It is currently licensed at a main lobe ERP of 6.03 kW and an HAAT of 65 m. The proposed 64 dBu restriction would limit any increase in future facilities to roughly 5,000 kW ERP at 340 m HAAT or 850 kW ERP at 610 m HAAT in the direction of the radio astronomy facility.

WSBK-TV, on Channel 38 in Boston, MA, is 94.2 km (58.5 miles) from the Hancock, NH radio astronomy facility. It is currently licensed at an ERP of 2,340 kW and an HAAT of 354 m. The proposed 64 dBu restriction would limit any increase in future facilities to roughly 5,000 kW ERP at 425 m HAAT or 1600 kW ERP at 610 m HAAT in the direction of the radio astronomy facility.

WDWL (TV), on Channel 36 in Bayamon, PR, is 68.3 km (42.4 miles) from the Arecibo, PR radio astronomy facility. It is currently licensed at an ERP of 9.33 kW and an HAAT of 329 m. The proposed 64 dBu restriction would limit any increase in future facilities to roughly 650 kW ERP at 329 m HAAT in the direction of the radio astronomy facility.

Our review of the TV engineering data base also indicates that no low power TV, TV translator or TV booster station is authorized facilities or applying for facilities that would exceed a predicted field strength of 64 dBu at any of the radio astronomy sites. There is one low power TV station construction permit (K38DR in Cedar Rapids, IA) that is 29.1 km (18 miles) from the North Liberty, IA, radio astronomy facility. This station is currently authorized an ERP of 9.7 kW and its HAAT in the direction of North Liberty was determined to be 131 m using a Commission computer program and topographic data base. It thus appears to deliver a field strength of 63.9 dBu at the North Liberty radio astronomy site.

propose that all other existing and future stations would be required to comply with the proposed 64 dBu limit when planning future facilities.

13. Additionally, we request comment on whether we should also require applicants for new facilities (or those proposing to modify existing facilities) on Channel 36 or Channel 38 that would be within 87.7 kilometers (55 miles) of a listed radio astronomy site to notify CORF (or some other appropriate radio astronomy representative) concerning their proposed facilities. We believe that the proposed rules, coupled with our application processing procedures, are probably sufficient to ensure protection to radio astronomy facilities. However, we ask whether notification procedures similar to those contained in Section 73.1030 would serve any useful purpose. Moreover, if such notification is considered expedient, we ask for comment on the most appropriate entity to notify. While the proposed rules do not contain a notification requirement, we may adopt such a requirement if the comments indicate that a significant benefit may be afforded by such notification.

14. Finally, with respect to the allotment aspects of CORF's petition, we propose to delete the Channel 38 allotment currently specified for Hilo, Hawaii. We note that this proposal appears to have only a very minimal impact on the TV broadcast service because both channels 20 and 26 would remain available as vacant non-reserved channel allotments in Hilo. Further, we propose to require that petitions for rulemaking proposing Channel 36 or 38 allotments which would be located within 87.7 kilometers (55 miles) of a radio astronomy site, must demonstrate compliance with the radio astronomy facility protection criteria adopted as a result of this proceeding. The proposed rule changes are indicated in Appendix A.

ADMINISTRATIVE MATTERS

Ex Parte Rules -- Non-Restricted Proceeding

15. This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. §§1.1202, 1.1203 and 1.1206(a).

Comment Information

16. Pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before March 31, 1995 and reply comments on or before April 21, 1995. To file formally in this proceeding, you must file an original plus four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239), 1919 M Street, N.W., Washington, D.C. 20554.

Regulatory Flexibility Act

17. An Initial Regulatory Flexibility Analysis is contained in Appendix B of this Notice of Proposed Rule Making.

Additional Information

18. For additional information on this proceeding, contact James E. McNally, Jr., Mass Media Bureau, (202) 776-1671.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

Parts 73 and 74 of Title 47 of the Code of Federal Regulations are proposed to be amended as follows:

PART 73 - RADIO BROADCAST SERVICES

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334.

2. Section 73.606(b) would be amended by removing the entry Hilo, Hawaii, Channel 38.

3. Section 73.611 would be amended by adding paragraph (a)(5) to read as follows:

§73.611 Reference points and distance computations.

(a) * * *

(5) If the reference point for a proposed new allotment on either Channel 36 or Channel 38 is within 87.7 kilometers (55 miles) of a radio astronomy site specified in Section 73.613(b), the channel may be allotted to such community based upon a showing that a station could be authorized in conformance with Section 73.613.

* * * * *

4. A new Section 73.613 would be added to read as follows:

§73.613 Channel 37 radio astronomy protection.

(a) An application to construct a new TV station on Channel 36 or 38, or to change the facilities of an existing station on Channel 36 or 38 will not be accepted if the field strength of the proposed station would exceed 64 dBu at any of the Channel 37 radio astronomy locations set forth in paragraph (b) of this section. The field strength

must be calculated using the horizontally polarized visual effective radiated power in the pertinent direction, the antenna height above average terrain in the pertinent direction determined in accordance with Section 73.684(d), and the F(50,50) curves in Section 73.699, Figure 10b.

(b) Channel 37 is used for radio astronomy at the following locations:

Location	N. Latitude	W. Longitude
Kitt Peak, AZ	31^0- 57'-23"	111^0-36'-45"
Owens Valley, CA	37^0-13'-54"	118^0-16'-34"
Mauna Kea, HI	19^0-48'-16"	155^0-27'-29"
North Liberty, IA	41^0-46'-17"	91^0-34'-27"
Hancock, NH	42^0-56'-01"	71^0-59'-12"
Los Alamos, NM	35^0-46'-31"	106^0-14'-44"
Pie Town, NM	34^0-18'-04"	108^0-07'-09"
Socorro, NM	34^0-03'-43"	107^0-37'-04"
Arecibo, PR	18^0-20'-46"	66^0-45'-11"
Fort Davis, TX	30^0-38'-06"	103^0-56'-41"
Saint Croix, VI	17^0-45'-31"	64^0-35'-03"
Brewster, WA	48^0-07'-52"	119^0-41'-00"
Green Bank, WV	38^0-25'-59"	79^0-25'-59"

PART 74 - EXPERIMENTAL, AUXILIARY, AND SPECIAL BROADCAST AND OTHER PROGRAM DISTRIBUTIONAL SERVICES

5. The authority citation for Part 74 continues to read as follows:

Authority: Secs. 4, 303, 48 Stat. 1066, as amended, 1082, as amended, 47 U.S.C. 154, 303, 554.

6. A new Section 74.711 is added to read as follows:

§74.711 Channel 37 radio astronomy protection.

An application to construct a new low power TV, TV translator or TV booster station on Channel 36 or 38, or to change the facilities of an existing station on Channel 36 or 38 will not be granted if the field strength of the proposed station would exceed 64 dBu at any of the radio astronomy locations set forth in Section 73.613(b) of this Chapter. The field strength must be calculated in accordance with the procedure set forth in Section 73.613(a) of this Chapter.

APPENDIX B

INITIAL REGULATORY FLEXIBILITY ANALYSIS

As required by §603 of the Regulatory Flexibility Act, the Commission has prepared the following Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Notice*, but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis. The Secretary shall send a copy of this *Notice of Proposed Rule Making*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the §Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 *et seq.* (1981)).

Reason for Action

Footnote US74 to the Table of Frequency Allocations contained in Section 2.106 of the Commission's rules specifies that radio astronomy facilities using the spectrum 608 to 614 MHz (TV Channel 37) are to "be protected from extraband radiation only to the extent that such radiation exceeds the level which would be present if the offending station were operating in compliance with the technical standards or criteria applicable to the service in which it operates." This language is not sufficiently clear to precisely establish the protection that radio astronomy facilities should be afforded. Also, because the locations of radio astronomy facilities were not known to broadcast applicants, the Commission has authorized construction of full service and low power television stations in close proximity to radio astronomy facilities, thereby potentially causing interference.

Objectives

This action is intended to eliminate the possibility of future authorization of facilities in excessive proximity to radio astronomy operations. The Commission proposes to amend its rules to specify the latitude and longitude of thirteen radio astronomy sites and to impose a simple field strength restriction that would apply to stations authorized on adjacent channels (i.e., Channels 36 and 38). This would effectively preclude interference to radio astronomy facilities.

Legal Basis

Authority for the actions proposed in this *Notice* may be found in Sections 4 and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154 and 303.

Reporting, Recordkeeping, and Other Compliance Requirements

None.

Federal Rules which Overlap, Duplicate, or Conflict with the Proposed Rule

None.

Description, Potential Impact and Number of Small Entities Involved

Because radio astronomy installations are located in rural areas, the number of station applications which may be affected by the field strength requirement should be very small, perhaps averaging less than one per year. In such cases, the applicant would need to design the facilities to limit the field strength produced at the radio astronomy site or possibly select another site. But because the protection requirement would be known in advance, there would be no relocation cost. There would be no impact on current broadcast licensees.

Any Significant Alternatives Minimizing the Impact on Small Entities and Consistent with the Stated Objectives

There are none apparent.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

WHYW Associates, L.P.

For Renewal of Licensee for Station WMYG(FM)[1]
Braddock, Pennsylvania

File No. BRH-910319YE

MEMORANDUM OPINION AND ORDER AND NOTICE OF APPARENT LIABILITY

Adopted: February 3, 1995; Released: February 21, 1995

By the Commission: Commissioner Quello concurring in the result.

I. INTRODUCTION

1. The Commission has before it for consideration: (i) a license renewal application for WMYG(FM) in Braddock, Pennsylvania; (ii) a Petition to Deny timely filed by the Pennsylvania State Conference of Branches of the National Association for the Advancement of Colored People and its various local NAACP branches (collectively "NAACP");[2] (iii) an opposition from the licensee; (iv) the licensee's responses to staff letters of inquiry; and (v) a Joint Request for Approval of Settlement Agreement between the NAACP and licensee, filed on October 28, 1993.

II. PLEADINGS

2. *Settlement Agreement.* On October 28, 1993, the NAACP and the licensee of Station WMYG(FM) filed a Joint Request for Approval of Settlement Agreement which, the parties state, resolves all allegations raised in the petition to deny against the station. We have reviewed the settlement agreement pursuant to 47 C.F.R. Section 73.3588 and *Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, Competing Applicants and Other Participants to Comparative Renewal Process and to the Prevention of Abuses of the Renewal Process,* 4 FCC Rcd 4780 (1989) (*Renewal Policies Order).* We find that the settlement agreement complies with the Commission's rules and policies and, therefore, the petition is dismissed. As is our practice in all cases, we reviewed the station's Equal Employment Opportunity (EEO) Program and performance pursuant to Section 309 of the Communications Act of 1934, as amended, 47 U.S.C. Section 309. We find that the licensee failed to engage in affirmative recruitment efforts for a substantial number of its vacancies and failed to maintain adequate records for self-assessment. We find, however, no evidence of employment discrimination. Thus, grant of the renewal application will serve the public interest. 47 U.S.C. Section 309(d)(2); *Astroline Communications Co. v. FCC,* 857 F.2d 1556 (D.C. Cir. 1988) (*Astroline).* Accordingly, we will grant renewal, but with appropriate remedies and sanctions.[3]

3. Section 73.2080 of the Commission's Rules, 47 C.F.R. 73.2080, requires that a broadcast licensee refrain from employment discrimination and establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ and promote qualified women and minorities. When evaluating EEO performance, the Commission focuses on the licensee's efforts to recruit, employ and promote qualified minorities and women and the licensee's ongoing assessment of its EEO efforts. Such an assessment enables the licensee to take corrective action if qualified minorities and women are not present in the applicant pool. The Commission also focuses on any evidence of discrimination by the licensee. *See* Sections 73.2080(b) and 73.2080(c).

4. When the renewal application indicates an absence of discrimination and a record of adequate EEO efforts, the application is granted, if otherwise appropriate. When it fails to evidence a record of adequate EEO efforts the Commission may impose a variety of sanctions or remedies, such as reporting conditions, renewal for less than a full term, forfeiture, or a combination thereof. Further, the Commission will designate the application for hearing if the facts so warrant. *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services,* 2 FCC Rcd 3967 (1987) (*Broadcast EEO); see also* 4 FCC Rcd 1715 (1989) (request for clarification by the National Association of Broadcasters). *See e.g., Beaumont Branch of the NAACP and the National Black Media Coalition v. FCC,* 854 F.2d 501, (D.C. Cir. 1988) (*Beaumont); Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC,* 595 F.2d 62 (D.C. Cir. 1978) (*Bilingual).*

5. Review of the licensee's renewal application and inquiry response reveals 53 full-time hires, including 43 upper-level hires, over the period January 1, 1988, through February 1, 1991. According to its renewal application, WMYG(FM) received 65 minority referrals from three general sources, 14 minority referrals from three minority sources and two minority referrals from one female source. In its inquiry response, the licensee's records indicate that it recruited for only 11 of the 53 full-time positions overall. Six of the 11 yielded minority applicants. It appears that WMYG(FM) contacted the following general and minority recruitment sources during the period under review: Urban League (for three positions), Council of Three Rivers American Indian Center (for one position), NAACP (for one position), *New Pittsburgh Courier* (for five positions), *The Pittsburgh Press* (for nine positions), *The Pittsburgh Post-Gazette* (for two positions), and *The Braddock Free Press* (for four positions). The licensee received minority applicants as follows: Urban League (three Black applicants

[1] The call letters for WMYG(FM) were changed to WRRK(FM) in October of 1991. In this *Order* we will refer to the station by its former call letters. Also pending before the Commission is a transfer of control application to assign WMYG(FM) from WHYW Associates, L.P. to WPNT, Inc. We will handle the assignment application in a separate proceeding.

[2] The Petition to Deny also included challenges against other radio stations in Pennsylvania and Delaware. They will be addressed in separate Commission orders.

[3] Because the petition was dismissed against WMYG(FM) pursuant to the settlement agreement, the issue of standing for NAACP is moot.

and one successful Black applicant), Council of Three Rivers American Indian Center (one American Indian applicant), NAACP (one Black applicant) and *New Pittsburgh Courier* (eight Black applicants). Other minority applicants came from: employee referrals (three successful Black applicants), temporary employment agencies (one successful Black (applicant) and miscellaneous[4] (six Black applicants). The licensee received 23 minorities (22 Blacks and one American Indian) among 105 applicants overall, including 17 minorities (17 Blacks) among 43 applicants for upper-level positions. Additionally, the licensee provided the referral sources for 43 of its 53 full-time hires. Employment sources for actual hires included: ten from employee references, eight from *The Pittsburgh Press*, seven were unsolicited, four from station referrals, three were client referrals and three from consultant referrals. The station hired one employee from each of the following sources: temporary agency, account referral, intern, contractor, Urban League, in-house posting, station owner and job consolidation. Minorities were present in 11 (seven upper-level) applicant pools. For five of these pools, the licensee did not affirmatively recruit, but instead the minority applicants were referred by employees (four pools) or a temporary agency (one pool). Review of the licensee's interview records reveal that it interviewed at least 89 applicants, of which 21 were Black including 18 for upper-level jobs. Minorities were included in nine overall interview pools and five upper-level interview pools. Five minorities (all Black) were hired overall, including four minorities for upper-level positions.[5]

6. Although there are deficiencies in recruitment and self-assessment, there are no substantial and material questions of fact to warrant designation for hearing. *See Astroline, supra*. The licensee hired and employed minorities and there is no evidence of employment discrimination. *See* n.4, *supra*. In addition, the licensee contacted referral sources, including minority oriented sources for some of its vacancies. Accordingly, grant of the license renewal is appropriate.

7. However, we find WMYG(FM)'s overall recruitment efforts deficient because it failed to recruit for 42 of its vacancies and made little effort to recruit Blacks.[6] Additionally, the licensee did not maintain adequate records for meaningful self-assessment. 47 C.F.R. Section 73.2080.

8. Last year, we adopted a Policy Statement regarding forfeitures to be assessed for violations of our EEO rules. *Standards for Assessing Forfeitures for Violations of the Broadcast EEO Rules*, 9 FCC Rcd 929 (1994) ("EEO Policy Statement"). A court decision issued since the EEO Policy Statement indicated that our general policy statement on forfeitures[7] must be put out for notice and comment. *United States Telephone Ass'n v. FCC*, 28 F.3d 1232 (D.C. Cir. 1994). While the *USTA* case did not address our EEO Policy Statement, members of the broadcast community have called for the withdrawal of the EEO Policy Statement until it is likewise made available to the public for notice and comment. *See, e.g., Petition for Declaratory Ruling by Eagle Radio, Inc.* (filed August 11, 1994); *Letter from Henry L. Baumann to William E. Kennard*, July 13, 1994. We will respond to these concerns in a separate order, and in the meantime, utilize our pre-January 1994 process of *stare decisis* by comparing the decisional case to an earlier ruling.

9. Under our previous authority, which was prior to December 1989, we used a process of *stare decisis*. We would analogize the cases based on factors such as, but not limited to, station size, number of hiring opportunities, MSA size, recruitment patterns, applicant and interview pools, assessment and record-keeping. Under this approach, in determining appropriate sanctions and/or remedies, we have carefully considered the facts and circumstances of this case in light of pertinent case precedent. We believe that the record in the instant case is similar to, but more egregious than, that of the licensee of WKLQ(FM), Holland, Michigan in *In re Applications of Lanser Broadcasting (Corporation, et al.,* 7 FCC Rcd 4254 (1992).[8] The MSA in which WKLQ(FM) was located included 7.3% minorities while WMYG(FM)'s labor force is comprised of 7.3% minorities. The licensee of WKLQ(FM) filled 53 full-time positions and contacted 18 general sources and seven minority sources during the review period. Further, WKLQ(FM) received 17 applications from minorities and interviewed 12 minorities for 53 full-time positions. The licensee of WKLQ(FM) hired three minorities and made an offer to one minority during the license term. In that case, we concluded that the station violated our EEO Rule inasmuch as it could not substantiate recruitment for every vacancy. We found also that the licensee failed to maintain adequate documentation for meaningful self-assessment. We issued a $2,000 Notice of Apparent Liability and imposed reporting conditions.

10. We also believe that the record of WMYG(FM) is comparable to, but, in some respects, less deficient than that of the licensee of WFMK(FM), East Lansing, Michigan in *In re Applications of Double L Broadcasting, et. al.*, 7

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[4] The licensee did not designate specific referral sources for two positions, the Business Manager hired on September 17, 1990, and the Traffic/Continuity Manager hired on October 1, 1990. A total of six minorities were interviewed for these positions, five for the Business Manager position and one for the Traffic/Continuity Manager position.

[5] The Pittsburgh, PA, Metropolitan Statistical Area (MSA), in which the station is located, has a 45.4% female and 7.3% minority labor force (6.4% Black, 0.4% Hispanic, 0.4% Asian/Pacific Islander, 0.2% American Indian). In the 1985 Annual Employment Report, one Black (3.7%) is listed among 27 full-time employees and 21 (4.7%) upper-level employees. In the 1986 report, one Black (4.3%) is listed among 23 full-time employees and 20 (5.0%) upper-level employees. In the 1987 report, one Black (3.7%) is listed among 27 full-time employees and 24 (4.2%)upper-level employees. In the 1988 report, one Black (3.7%) is listed among 27 full-time employees and 23(4.0%) upper-level employees. No minorities are listed among the 31 full-time or 27 upper-level employees in 1989. The 1990 report lists two Blacks (6.0%) among 33 full-time employees and 27 (7.0%) upper-level employees. The 1991 report lists one Black (3.0%) among 27 full-time employees and 23 (4.0%) upper-level employees.

[6] The licensee is reminded that under our EEO Rule, 47 C.F.R. §73.2080, it has an affirmative obligation to recruit for females and minorities for each vacancy. Inasmuch as WMYG(FM) neglected to recruit for 42 vacancies, female, as well as minority, employment was affected.

[7] *Standards for Assessing Forfeitures*, 6 FCC 4695 (1991), *recon. denied*, 7 FCC Rcd 5339 (1992), *revised*, 8 FCC Rcd 6215 (1993).

[8] The Grand Rapids, Michigan MSA in which WKLQ(FM) was located had a 42.3% female and 7.3% minority labor force (4.3% Black, 2.0% Hispanic, 0.6% Asian/Pacific Islander, and 0.4% American Indian).

FCC Rcd 6435 (1992).[9] The licensee of WFMK(FM) had 47 hiring opportunities for which it used a total of 36 recruitment sources, including 6 minority or female oriented organizations or publications. However, the licensee did not recruit for nine positions and used only one general source for an additional 15 vacancies. Thus, the licensee of WFMK(FM) engaged in minimal or no outreach for 24 of 47 positions. The station received only four minority applicants and hired no minorities during a three-year review period. No minorities were listed on the licensee's 1986-1989 Annual Employment Reports which reflected full-time staffs ranging from 14 to 18 overall employees and between 13 and 14 upper-level employees. We renewed the license of WFMK(FM) subject to reporting conditions and issued a Notice of Apparent Liability for $13,000 based on our conclusion that the licensee had made inadequate recruiting efforts and had failed to self-assess its EEO program.

11. Both WKLQ(FM) and WFMK(FM), although issued in 1992, were decided based on our former forfeiture authority which was (significantly lower.)[10] Previously, the forfeiture penalty assessed against a broadcaster could "not exceed $2,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation could not exceed a total of $20,000". In 1989, Congress substantially increased the dollar amounts of our forfeiture authority. Pub. L. No. 100-239, 103 Stat. 2131. Pursuant to Section 503(b)(2), the forfeiture penalty assessed against a broadcaster may "not exceed $25,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of $250,000 for any single act or failure to act".

12. However, even before our forfeiture authority was expanded in 1989, we assessed substantial fines for EEO recruitment deficiencies. *See e.g., Kansas City Youth for Christ*, 3 FCC Rcd 6866 (1988) (licensee received $10,000 forfeiture, short-term renewal and reporting conditions for failure to self-assess and make any efforts to recruit women or minorities); *In re Applications of Certain Broadcast Stations Serving Communities in the State of South Carolina*, 5 FCC Rcd 1704 (1990) (licensee received $10,000 forfeiture, short-term renewal and reporting conditions where it failed to hire minorities for upper-level positions in a 6 1/2 year period, and did not use recruitment sources which generated minority referrals); *Commission's Letter to John P. Healy, Treasure Coast Radio, Inc.*, 5 FCC Rcd 3745 (1990) (licensee received $10,000 forfeiture and reporting conditions where its recruitment efforts attracted no minority candidates in labor market with a 12.5% Black labor force, and its records did not show any contacts with minority organizations or hires during a two year period). These deficiencies are somewhat more egregious than those in the instant case. Consequently, the amount assessed in the instant case is lower in proportion to our current forfeiture authority ($250,000) than the amount in the cited cases was to our previous forfeiture authority ($20,000).

13. Here, the record indicates that the licensee recruited for eleven of its 53 vacancies and that minorities were present in eleven applicant pools and nine interview pools. In addition, WMYG(FM) contacted minority-oriented sources for only four positions and it failed to maintain adequate records of its EEO efforts for specific vacancies. Regarding record-keeping, WMYG(FM) could not identify the referral sources for each of its full-time hires and neglected to maintain adequate records for meaningful self-assessment. 47 C.F.R. §73.2080. Finally, the licensee hired five (9.4%) minorities during the review period.

14. We believe that the facts in the instant case are similar to, but more egregious than, those in WKLQ(FM), particularly with regard to WMYG(FM)'s failure to recruit for a significant number of its vacancies. The licensee of WKLQ(FM) did not establish recruitment efforts for each vacancy. Here, our review of the record indicates that WMYG(FM) affirmatively recruited for only eleven (21%) of its overall vacancies. Further, recruitment deficiencies are apparent in WMYG(FM)'s failure to engage in sufficient efforts to recruit Blacks. Specifically, it failed to contact minority sources for all but five positions, and used only four general and three minority sources during the period under review. Comparatively, we conclude that WMYG(FM)'s EEO deficiencies are, in some respects, less egregious than those of the licensee in WFMK(FM). Both stations were deficient in recruiting. However, WFMK(FM) recruited for a higher percentage (49%) of its total jobs than did WMYG (21%). That discrepancy notwithstanding, the record of WFMK(FM) is more egregious than that of WMYG(FM) because WFMK(FM)'s EEO program resulted in no minority hires over a similar three-year review period. Moreover, WFMK(FM) did not have a minority on its staff throughout its license term.[11] In contrast, WMYG(FM) hired five minorities, including four for upper-level positions, and had at least one minority on its staff during every year of its license term except 1989. Given the facts of this case, broadcasters' familiarity with our long-standing EEO rule, as well as our expanded authority to assess forfeitures in this area, we feel that the circumstances in this case justify issuance of a Notice of Apparent Liability for $16,000. Further, we will impose reporting conditions to monitor the licensee's prospective recruitment measures. Accordingly, we will grant renewal subject to reporting conditions, and issue a Notice of Apparent Liability for $16,000.

III. CONCLUSION

15. Upon review of the record, we find that grant of the renewal application is in the public interest. However, we will grant the renewal application of WMYG(FM) subject

[9] The Lansing-East Lansing MSA, in which the station was located, included 43.8% females and 8.5% minorities (4.9% Black, 2.5% Hispanic, .7% Asian/Pacific Islander, .4% American Indian).

[10] Section 503(b)(2) of the Communications Act of 1934, as amended, 47 U.S.C. §503(b)(2), authorizes the Commission to impose monetary forfeitures on broadcast station licensees or permittees for violations of the Act or of regulations promulgated thereunder.

[11] This includes the period from November 28, 1986, when the Commission granted an assignment of license for WFMK(FM) to the licensee, through the end of the license term in 1989.

to reporting conditions.[12] Further, by this *Order*, we will issue a Notice of Apparent Liability in the amount of $16,000.

IV. ORDERING CLAUSES

16. Accordingly, IT IS ORDERED, that the Joint Request for Approval of Settlement Agreement filed by the NAACP and WHYW Associates, L.P. regarding Station WMYG(FM) IS GRANTED and the settlement agreement IS APPROVED.

17. IT IS FURTHER ORDERED, that the Petition to Deny filed by the NAACP against WMYG(FM) IS DISMISSED.

18. IT IS FURTHER ORDERED, that the renewal application filed by WHYW Associates, L.P. for Station WMYG(FM) IS GRANTED subject to the reporting conditions described herein and, pursuant to Section 503 of the Communications Act of 1934, as amended, 47 U.S.C. §503, a NOTICE OF APPARENT LIABILITY FOR FORFEITURE in the amount of $16,000.

19. IT IS FURTHER ORDERED, that the licensee of Station WMYG(FM), submit to the Commission an original and one copy of the following information on April 1, 1995, April 1, 1996, and April 1, 1997:

(a) For each report, please make two lists divided by full-time and part-time job vacancies during the twelve months preceding the respective reporting dates, indicating the job title and FCC job category, date of hire, the race or national origin, sex and the referral source of each applicant for each job and the race or national origin and sex of the person hired. The list should also note which recruitment sources were contacted;[13]

(b) A list of employees as of the March 1st payroll period for each annual report by job title, indicating full-time or part-time status (ranked from highest paid classification), date of hire, sex, and race or national origin; and

(c)Details concerning the station's efforts to recruit minorities for each position filled during each respective 12-month period specified, including identification of sources used and indicating whether any of the applicants declined actual offers of employment. In addition, the licensee may submit any information it believes relevant (regarding the station's EEO performance and its efforts thereunder.

20. IT IS FURTHER ORDERED, that the Mass Media Bureau send by Certified Mail -- Return Receipt Requested -- one copy of this Memorandum Opinion and Order and Notice of Apparent Liability to all parties.

21. The reports are to be filed with the Acting Secretary of the Commission for the attention of the Mass Media Bureau's EEO Branch.

22. Should you have any questions regarding this action or require further information concerning employment records, you may call the Mass Media Bureau's EEO Branch at (202) 632-7069. With respect to the forfeiture proceeding, the licensees may take any of the actions set forth in Section 1.80, as summarized in the attachment to this *Order*. Any comments concerning the ability to pay should include those financial items set forth in the attachment.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[12] In view of the pending assignment application for WMYG(FM), we note that upon grant of that application, reporting conditions will follow the license as a matter of law and pass automatically to the assignee. *See e.g., San Luis Obispo Limited Partnership*, 9 FCC Rcd 894 (1994); *Woolfson Broadcasting, Inc.*, 4 FCC Rcd 6160 (1989).

[13] Such a list might start:

(1) News Director; Officials and Managers; Full-time

3 Applicants:	1 White female	A.W.R.T.
	1 Hispanic male	National Hispanic Media Coalition
	1 Black female	NAACP

Sources contacted: Local newspaper, A.W.R.T., National Hispanic Media Coalition and NAACP. Selected: Hispanic male (08/19/94).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-23

In the Matter of

Amendment of Section 73.202(b), RM-8578
Table of Allotments,
FM Broadcast Stations.
(Madisonville, Texas)

NOTICE OF PROPOSED RULE MAKING

Adopted: February 9, 1995; Released: February 21, 1995

Comment Date: April 14, 1995
Reply Comment Date: May 1, 1995

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Leon Hunt, d/b/a Hunt Broadcasting ("petitioner"), requesting the allotment of Channel 272A to Madisonville, Texas, as the community's second local commercial FM service. Petitioner states it will apply for Channel 272A, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 272A to Madisonville, since it could provide the community with an additional local FM service. Channel 272A can be allotted to Madisonville in compliance with the Commission's minimum distance separation requirements with a site restriction of 7.0 kilometers (4.3 miles) northwest to avoid a short-spacing conflict with the licensed site of Station KMJQ(FM), Channel 271C, Houston, Texas.[1]

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Madisonville, Texas	241C2	241C2, 272A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **April 14, 1995**, and reply comments on or before **May 1, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Christopher D. Imlay, Esq.
Booth, Freret and Imlay
1233-20th Street, N.W.
Suite 204
Washington, D.C. 20554
(Counsel for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Pam Blumenthal, Mass Media Bureau, (202)418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] The coordinates for Channel 272A at Madisonville are North Latitude 31-00-25 and West Longitude 95-56-30. Petitioner proposed coordinates North Latitude 31-02-24 and West Longitude 95-54-41 with a site restriction of 10.0 kilometers (6.2 miles) North. However, the Commission generally does not protect a prospective applicant's desired transmitter site for a new allotment if a less restrictive site is available, as there is no guarantee that the petitioner will ultimately become the licensee. Therefore, we will not consider petitioner's site, and advance a less restrictive site for the allotment of Channel 272A at Madisonville, Texas.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1),303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-25

In the Matter of

Amendment of Section 73.202(b), RM-8588
Table of Allotments,
FM Broadcast Stations.
(Waldport, Oregon)

NOTICE OF PROPOSED RULE MAKING

Adopted: February 9, 1995; Released: February 21, 1995

Comment Date: April 14, 1995
Reply Comment Date: May 1, 1995

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Jarvis Communications, Inc. ("petitioner"), requesting the allotment of Channel 288A to Waldport, Oregon, as the community's first local FM broadcast service. Petitioner states that it will apply for the channel, if allotted.

Technical Summary

2. Channel 288A can be allotted to Waldport in compliance with the Commission's minimum distance separation requirements with a site restriction of 12.4 kilometers (7.7 miles) northwest to avoid a short-spacing to vacant but applied-for Channel 288A at Cottage Grove, Oregon.[1] We note that this allotment is short-spaced to the present operation on Station KFAT, Channel 291C, Corvallis, Oregon. However, Station KFAT's license has been modified to specify operation on Channel 292C pursuant to the *Report and Order* in MM Docket No. 87-523. *See* 4 FCC Rcd 839 (1988).

3. We believe the public interest would be served by proposing the allotment of Channel 288A to Waldport since it could provide the community with its first local FM broadcast service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Waldport, Oregon	--	288A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **April 14, 1995**, and reply comments on or before **May 1, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Matt Jarvis
Jarvis Communications, Inc.
Radio Station KORC-AM
P.O. Box 1419
Waldport, Oregon 97394
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 776-1668. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] The coordinates for Channel 288A at Waldport are 44-32-17 North Latitude and 124-03-37 West Longitude.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1),303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-24

In the Matter of

Amendment of Section 73.202(b), RM-8583
Table of Allotments,
FM Broadcast Stations.
(Clarendon, Texas)

NOTICE OF PROPOSED RULE MAKING

Adopted: February 9, 1995; Released: February 21, 1995

Comment Date: April 14, 1995
Reply Comment Date: May 1, 1995

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by ROHO Broadcasting ("petitioner"), requesting the allotment of Channel 257C2 to Clarendon, Texas, as the community's first local aural transmission service. Petitioner states it will apply for Channel 257C2, if allotted.[1]

2. In support of its proposal, petitioner states that Clarendon is the county seat of Donley County and adoption of its proposal would provide the community with its first local service. In addition, petitioner submits that Clarendon has a city government, as well as an Emergency Medical Services System and its own independent public school system for all grades. Furthermore, petitioner states that the city has its own business identity through 2 banks, 5 grocery stores, 65 retail outlets, 10 restaurants, 9 churches, 12 professional businesses, and 12 civil organizations.

3. We believe the public interest would be served by proposing the allotment of Channel 257C2 to Clarendon,[2] since it could provide the community with its first local FM service. Channel 257C2 can be allotted to Clarendon in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[3]

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Clarendon, Texas	–	257C2

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **April 14, 1995**, and reply comments on or before **May 1, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Keith Hodo
ROHO Broadcasting
P.O. Box 1090
Clarendon, Texas 79226
(Petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Pam Blumenthal, Mass Media Bureau, (202)418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a

[1] Although petitioner's request indicates that the original copy of its proposal was signed, petitioner failed to include an affidavit verifying that the statements contained in its petition were accurate to the best of its knowledge. Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission by a party not represented by counsel be signed and verified by the party and his/her address stated. In the absence of such verification, the petition may be dismissed. Section 1.40(b) of the Commission's Rules concerning rule making proceedings places petitioners on notice that their proposal must conform with the requirements of Section 1.52 regarding subscription and certification. *See also Amendment of Section 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, 5 FCC Rcd 3911, n.42 (1990). Petitioner is requested to rectify this omission in its comments.

[2] According to the U.S. Census, Clarendon is an incorporated community with a population of 2,067 persons.

[3] The coordinates for Channel 257C2 at Clarendon are North Latitude 34-56-16 and West Longitude 100-53-16.

request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1),303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Warner Cable Communications LOI-93-14
Milwaukee, Wisconsin

Letter of Inquiry - Negative Option
Billing Issue

MEMORANDUM OPINION AND ORDER

Adopted: January 19, 1995; Released: January 20, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. In a letter to the Commission dated September 28, 1993, the City of Milwaukee alleged that Warner Cable Communications ("Warner Cable") violated Commission regulations governing the provision of cable television service arising from Warner Cable's Milwaukee offerings. In response to this complaint, the Commission issued Letter of Inquiry 93-14 ("LOI") to Warner Cable on November 17, 1993. The LOI requested Warner Cable to provide information concerning, among other issues, compliance with the Communications Act's prohibition on negative option billing.[1]

2. We conclude that Warner Cable's conduct, during the time period addressed by the LOI, with regard to automatically subscribing its customers to individual a la carte channels and an a la carte package of four channels, did not violate the negative option billing provisions of federal law.

II. FACTS

3. Beginning September 1, 1993, the effective date of the Commission's rate regulation rules, Warner Cable restructured its channel offering on its cable system in Milwaukee, Wisconsin. Prior to September 1, Warner Cable offered a 27 channel basic tier and a 24 channel cable programming service tier. After September 1, two channels from the basic tier, WTBS and WGN, were offered to subscribers on an optional basis for $.79 each. In addition, two channels from the cable programming service tier, Discovery and E!, were offered on an optional basis for $.79 each. These four channels were also available as a package for $2.20. Subscribers to the basic tier continued to receive the same channels after September 1 that they had received prior to September 1. The same was true for subscribers taking the cable programming service tier. Bills for subscribers to both the basic and cable programming service tiers who did not affirmatively request elimination of any of the new options remained the same in total price as prior to September 1 but contained a separate itemization of the basic, cable programming service, and the new individual or package offerings.

4. Warner Cable states that subscribers were informed of the new a la carte offerings through the following means: (1) a scrawling message that was cablecast on The Weather Channel on August 30, 1993; (2) a September 1, 1993 notice in *The Milwaukee Journal;* (3) an informational letter sent to all customers on or about September 20, 1993; (4) a message printed on the September and October 1993 monthly billing statements, plus a bill insert; (5) a message continuously shown on Channel 52 from August 30, 1993 until September 10, 1993; (6) a full page advertisement in the television book of *The Milwaukee Journal;* (7) from September 10, 1993 to October 4, 1993, the continuous showing of a 30 minute television program on Channel 52 explaining rate regulation issues; and (8) a notice posted in the lobby of its local billing office. These various announcements informed subscribers that the service was optional and could be cancelled by mail or telephone. (If a subscriber cancelled the service, the account was credited back to September 1, 1993.)

III. BACKGROUND

5. In the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act"), Congress created a process for regulating cable programming and equipment rates. Section 3(f) of the 1992 Cable Act adds a new provision to the Communications Act which states that "[a] cable operator shall not charge a subscriber for any service or equipment that the subscriber has not affirmatively requested by name."[2] It further specifies that "a subscriber's failure to refuse a cable operator's proposal to provide such service or equipment shall not be deemed to be an affirmative request for such service or equipment."[3] This prohibited billing practice is commonly referred to as negative option billing.

6. In the *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation,* MM Docket 92-266, *Report and Order and Further Notice of Proposed Rulemaking, ("Rate Order")*[4] implementing this Section of the 1992 Cable Act, the Commission explained that the prohibition against negative option billing applies to "additions of a new tier of service or a new single channel of service without the affirmative

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[1] The LOI also requested information regarding a premium access charge and compliance with the *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation,* MM Docket 92-266, 8 FCC Rcd 2921, 58 FR 17530 (April 5, 1993), *clarified,* 8 FCC Rcd 2917, 58 FR 21929 (April 26, 1993); *extended,* FCC 93-304 (released June 15, 1993), 58 FR 33560 (June 18, 1993), *Erratum,* 8 FCC Rcd 4511 (1993); *extended,* FCC 93-494 (released November 10, 1993), 58 FR 60141 (November 15, 1993); *extended,* 9 FCC Rcd 1299, 59 FR 6901 (February 14, 1994). These issues are not addressed in this Memorandum Opinion and Order. A question about the regulatory status of certain of Warner Cable's service packages was also raised by the City and has already been separately addressed. *Warner Cable Communications, Milwaukee, Wisconsin,* Letter of Inquiry 93-14, DA 94-1276 (November 18, 1994).

[2] Communications Act of 1934, as amended, § 623(f), 47 U.S.C. § 543(f) (1992).

[3] *Id.*

[4] 8 FCC Rcd 5631 (1993).

assent of a subscriber."[5] It added, however, that the negative option billing provision does not apply to "a change in the mix of channels in a tier, including additions or deletions of channels . . . unless they change the fundamental nature of the tier" or to rate increases unless the price change is accompanied by a fundamental change in service, such as the addition of a new tier.[6] Further, it stated that restructuring of tiers and equipment will not bring the prohibition into play if the subscribers continue to receive the same number of channels and the same equipment unless the restructuring effects a fundamental change in the nature of the service.[7]

7. The rule adopted, with subsequent revisions, states:

Section 76.981 Negative Option Billing

(a) A cable operator shall not charge a subscriber for any service or equipment that the subscriber has not affirmatively requested by name. A subscriber's failure to refuse a cable operator's proposal to provide such service or equipment is not an affirmative request for service or equipment. A subscriber's affirmative request for service or equipment may be made orally or in writing.

(b) The requirements of paragraph (a) of this Section shall not preclude the adjustment of rates to reflect inflation, cost of living and other external costs, the addition or deletion of a specific program from a service offering, the addition or deletion of specific channels from an existing tier of service, or the restructuring or division of existing tiers of service, or the adjustment of rates as a result of the addition, deletion or substitution of channels pursuant to Section 76.922 of this Subpart, provided that such changes do not constitute a fundamental change in the nature of an existing service or tier of service and are otherwise consistent with applicable regulations.

(c) State and local governments may not enforce state and local consumer protection laws that conflict with or undermine paragraph (a) or (b) of this Section or any other sections of this Subpart that were established pursuant to Section 3 of the 1992 Cable Act, 47 U.S.C. §543.[8]

IV. DISCUSSION

8. The 1992 Cable Act provides that "[a] cable operator shall not charge a subscriber for any service or equipment that the subscriber has not affirmatively requested by name."[9] Subscribers to the Warner Cable system did not receive any channel not affirmatively requested. After the changes in question, subscribers received the same number of channels they had originally ordered and the same programming services. The bill (from a subscriber receiving 51 channels) that Warner Cable attached to its response, however, shows an entry and charge for the "WTBS/WGN/E!/Discovery" package separate from the basic and standard tiers. Thus the issue remains whether the unbundling or subdivision of existing offerings into smaller component parts, each with different names or designations, precludes subscribers from being billed for those parts that were not specifically named when service initially was requested. After careful review, we conclude that Warner Cable's conduct that is the subject of this LOI does not violate the negative option billing provisions of the statute or the Commission's rules.

9. Warner Cable asserts that these new packages and individual channel offerings are not new services but are simply part of "restructured" or "retiered" offerings of channels that subscribers were receiving prior to the "restructuring." It argues that it followed Commission rules which do not apply the negative option billing prohibition to restructuring that does not result in a fundamental change in the nature of existing tiers of service.[10] In the *Rate Order*, in which 47 C.F.R. § 76.981 initially was adopted, the Commission specifically considered whether subdivision of services in implementing the rate regulation provisions of the 1992 Cable Act would conflict with the negative option restriction. The rule adopted specifically exempts "the restructuring *or division* of existing tiers of service, . . . provided that such changes do not constitute a fundamental change in the nature of an existing service or tier of service and are otherwise consistent with applicable regulations."[11] In formulating this rule, the Commission had been asked to hold that splitting an existing basic tier into a new basic and an expanded basic tier in association with a rate increase would conflict with the negative option billing restriction. The Commission determined that, "restructuring of tiers and equipment, including restructuring appropriate for implementing the Cable Act's provisions, will not bring the negative option billing provision into play if subscribers will continue to receive the same number of channels and the same equipment."[12] An objection to this approach based on a concern that revenue-neutral changes might result in programming being switched to a deregulated tier was rejected.[13] These statements are directly applicable to the type of restructuring undertaken by Warner Cable.

10. The Commission's rule is based on the reasonable interpretation of the statute. Of course, the statute could be read to require affirmative consent prior to any change in service, no matter how minor. But in the Commission's view, such an interpretation would contravene Congressional intent and the underlying purposes of the federal cable rate regulations. The Conference Report on the 1992 Cable Act made clear that the federal negative option billing provision was "not intended to apply to changes in the mix of programming services that are included in

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[5] Rate Order ¶ 440.
[6] *Id.*
[7] *Id.* at ¶ ¶ 440-441 & n.1105 (the Commission recognized that the 1992 Cable Act did not restrict movement of channels to deregulated status but it doubted that such changes would occur frequently).
[8] 47 C.F.R. §76.981. This section of the rules was initially adopted in the *Rate Order* and was amended in the Commission's *Sixth Order on Reconsideration and Seventh Notice of Proposed Rulemaking in Dockets 92-266 and 93-215*, FCC 94-286 (released November 18, 1994) (*"Sixth Order on Reconsideration"*).
[9] Communications Act of 1934 § 623(f), 47 U.S.C. § 543(f) (1992).
[10] *See* 47 C.F.R. § 76.981.
[11] *Id.* (emphasis added).
[12] *Rate Order* at ¶ 441.
[13] *Id.* at ¶ 440 & n.1105.

various tiers of cable service."[14] Thus, Congress never intended for Section 3(f) – the negative option billing prohibition – to apply to every programming change. Moreover, if Section 3(f) were read that broadly, it would thwart a primary purpose of the cable rate rules: "encourag[ing] the provision of new services that subscribers desire at the reasonable rates mandated by Congress."[15] In light of the legislative history and purpose of the 1992 Cable Act, the Commission concluded that Section 3(f) does not apply to minor restructuring of an existing tier. Moreover, and particularly with respect to the retiering that occurred in 1993 upon the initiation of rate regulation pursuant to the 1992 Cable Act, the Commission concluded in 47 C.F.R. § § 76.981 §76.981 that affirmative consent is not required prior to restructuring or division of existing tiers of service that do not result in a fundamental change in the nature of an existing service or tier of service.[16]

11. This interpretation of Commission rules, we believe, protects the interests of subscribers in not being billed for services they have not requested and is necessary to reconcile this provision of the 1992 Cable Act with the rate regulation provisions also adopted therein. The language of Section 3(f) is logically read as permitting subscribers to be billed for a bundle of services "affirmatively ordered by name" even if the name of the service has subsequently changed or that package has been unbundled into smaller component parts; the service received remains the service ordered by name. The words of the section are fairly read as meaning that the purchaser receives what was ordered and not that the name of the service delivered remains unchanged. A different reading could well result in the abrupt withdrawal of service, a result that would be inconsistent with the rate regulation and consumer protection objectives of this section.

12. Further, we believe this is one of those situations that the Commission has previously referenced where state and local officials "may not enforce negative option billing rules that would obstruct the accomplishment of the objectives of Congress's cable rate provisions."[17] The Commission specifically contemplated that, as part of the process of complying with the initial introduction of rate regulation, cable operators would have the flexibility and in some cases be required to retier, divide, or unbundle their service offerings on a faster than usual schedule without complying, for example, with notice or other requirements generally applicable.[18]

13. The concern of Section 3(f) as a consumer protection mechanism is that subscribers not be billed for services that they never ordered. The restrictions of this provision protect subscribers from having to take on the burden of identifying and negatively responding to charges for services that appear on a bill that are not desired and for which no request has been made. It protects subscribers both from inadvertent payment of such charges and from becoming contractually bound for them. Thus, when the service received is not altered, but rather is simply unbundled, the above interpretation is consistent with the achievement of this objective. It protects subscribers from receiving what has not been ordered; but it does not mandate cutting off what has been ordered. To cut off service requested offends the contractual relationship between buyer and seller as much as does adding service not requested. This is especially true when the restoration of service that has been terminated imposes an additional expense on the subscriber for termination or resubscription charges.

14. While we conclude that there was no violation of the prohibition against negative option billing here, we note that the restructuring done in this case by Warner Cable was necessarily done in a situation occasioned by the inception of rate regulation where time was short due to statutory deadlines leading to fundamental industry change. In contrast, creation of new product tiers, (tiers specifically provided for in the Sixth Order on Reconsideration that may be made up of channels that were offered on the basic or cable programming services tiers for a period of time) will come in a more settled environment where operators will be able to take the time necessary to accomplish effective affirmative marketing.[19] Accordingly, Commission rules expressly provide for the affirmative marketing of new product tiers.[20]

V. ORDERING CLAUSES

15. Accordingly, IT IS CONCLUDED that Warner Cable Communications operating in Milwaukee, Wisconsin has not, through the conduct described above, violated Section 3(f) of the 1992 Cable Act, 47 U.S.C. §543(f), or Section 76.981 of the Commission's rules. 47 C.F.R. § 76.981.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[14] H.R. Rep. No. 862, 102d Cong., 2d Sess. at 65 (1992).

[15] *Sixth Order on Reconsideration* at ¶ 118.

[16] *See Amicus Curiae* Brief of the Federal Communications Commission, *Time Warner Cable v. James E. Doyle*, No. 94-1894, 7th Cir. Ct. App.

[17] *Sixth Order on Reconsideration* at ¶ 119.

[18] As the Commission previously stated " it is indisputable that a delay of rate regulation for all cable systems and for all subscribers . . . would undercut the congressional mandate that cable rates be regulated and the underlying congressional determination that such rate regulation is in the public interest." *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking* in Docket 92-266, FCC 93-389 (released July 27, 1993)(preempting conflicting notice provisions) and *Order* in Docket 92-266, FCC 93-266 (released May 14, 1993) (preempting conflicting notice provisions).

[19] *Sixth Order on Reconsideration* at ¶ ¶ 22-37.

[20] *Id.* at ¶ 29.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Comcast Cablevision, Tallahassee, Florida — LOI-93-2

Letter of Inquiry - Negative Option Billing Issue

MEMORANDUM OPINION AND ORDER

Adopted: January 19, 1995; Released: January 20, 1995

By the Chief, Cable Services Bureau

I. INTRODUCTION

1. In a letter dated September 16, 1993, the City of Tallahassee alleged that Comcast Cablevision ("Comcast") violated Commission regulations governing the provision of cable television service arising from Comcast's Tallahassee offerings. In response to this complaint, the Commission issued this Letter of Inquiry 93-2 ("LOI") to Comcast on November 17, 1993. The LOI requested Comcast to provide information concerning, among other issues, compliance with the Communications Act's prohibition on negative option billing.[1]

2. We conclude that Comcast's conduct, during the time period addressed by the LOI, with regard to automatically subscribing its customers to (a) individual a la carte channels or an a la carte package, depending upon their previous level of service, and (b) a wire maintenance service plan, did not violate the negative option billing provisions of federal law.

II. FACTS

3. Beginning September 1, 1993, Comcast restructured its channel offerings on its cable system in Tallahassee, Florida. Prior to September 1, Comcast offered a 13 channel basic tier and a 20 channel cable programming service tier. After September 1, one channel from the basic tier, WTBS, was offered to subscribers on an optional basis for $.33 per month. In addition, three channels from the cable programming service tier, TNT, The Family Channel and The Nashville Network, were offered on an optional basis for $.33 a month each, with the exception of TNT, which was offered at $.49 per month. These four channels were also available as a package for $.65 called "Value Pac". Subscribers to the basic tier continued to receive the same channels after September 1 that they had received prior to September 1. The same was true for subscribers taking the cable programming service tier. Bills for programming services for subscribers to both the basic and cable programming service tiers that did not affirmatively request elimination of any of the new options did not increase in total price from pre-September 1 rates. Comcast states that subscribers were informed of the prices for its a la carte services in an August 1993 advertisement in *The Democrat*, a local newspaper. In addition, in its first post-September 1 bill, Comcast included a pamphlet informing subscribers that such services were optional and could be cancelled by telephone.

4. Also beginning on September 1, 1993, Comcast unbundled its programming service rates from equipment charges. Comcast states that prior to September 1, it provided unlimited customer premises visits, regardless of the cause or source of the problem, at no additional charge to its customers. It states that after September 1, it calculated the actual cost for providing these service calls to determine a monthly charge of $.45 for wire maintenance, which was itemized separately on customer bills. Comcast states the subscribers were informed of the wire maintenance plan in August 1993 advertisements in *The Tallahassee Democrat*, a local newspaper. In addition, Comcast states that subscribers received a pamphlet with their first bill after September 1, 1993, explaining that the wire maintenance plan was optional and would cover in-home service visits for non-company owned equipment and wiring. Comcast further states that the pamphlet informed subscribers that they could cancel the wire maintenance service by telephone but, if they did so, would be charged an hourly service charge of $25.66 for any service calls.

III. BACKGROUND

5. In the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act"), Congress created a process for regulating cable programming and equipment rates. Section 3(f) of the 1992 Cable Act adds a new provision to the Communications Act which states that "[a] cable operator shall not charge a subscriber for any service or equipment that the subscriber has not affirmatively requested by name."[2] It further specifies that "a subscriber's failure to refuse a cable operator's proposal to provide such service or equipment shall not be deemed to be an affirmative request for such service or equipment."[3] This prohibited billing practice is commonly referred to as negative option billing.

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[1] The LOI also requested information concerning compliance with regulations governing the *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket 92-266, 8 FCC Rcd 2921, 58 FR 17530 (April 5, 1993), *clarified*, 8 FCC Rcd 2917, 58 FR 21929 (April 26, 1993); *extended*, FCC 93-304 (released June 15, 1993), 58 FR 33560 (June 18, 1993), *Erratum*, 8 FCC Rcd 4511 (1993); *extended*, FCC 93-494 (released November 10, 1993), 58 FR 60141 (November 15, 1993); *extended*, FCC 94-33 (released February 8, 1994), 59 FR 6901 (February 14, 1994). This issue is not addressed in this Memorandum Opinion and Order. A question about the regulatory status of certain of Comcast's service packages was also raised by the City and has already been separately addressed. *Comcast Cablevision, Tallahassee, Florida*, Letter of Inquiry 93-2, DA 94-1275 (November 18, 1993).

[2] Communications Act of 1934, as amended § 623(f), 47 U.S.C. § 543(f) (1992).

[3] *Id.*

6. In the *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation,* MM Docket 92-266, *Report and Order and Further Notice of Proposed Rulemaking,* (*"Rate Order"*)[4] implementing this Section of the 1992 Cable Act, the Commission explained that the prohibition against negative option billing applies to "additions of a new tier of service or a new single channel of service without the affirmative assent of a subscriber."[5] It added, however, that the negative option billing provision does not apply to "a change in the mix of channels in a tier, including additions or deletions of channels . . . unless they change the fundamental nature of the tier" or to rate increases unless the price change is accompanied by a fundamental change in service, such as the addition of a new tier.[6] Further, it stated that restructuring of tiers and equipment will not bring the prohibition into play if the subscribers continue to receive the same number of channels and the same equipment unless the restructuring effects a fundamental change in the nature of the service.[7]

7. The rule adopted, with subsequent revisions, states:

Section 76.981 Negative Option Billing

(a) A cable operator shall not charge a subscriber for any service or equipment that the subscriber has not affirmatively requested by name. A subscriber's failure to refuse a cable operator's proposal to provide such service or equipment is not an affirmative request for service or equipment. A subscriber's affirmative request for service or equipment may be made orally or in writing.

(b) The requirements of paragraph (a) of this Section shall not preclude the adjustment of rates to reflect inflation, cost of living and other external costs, the addition or deletion of a specific program from a service offering, the addition or deletion of specific channels from an existing tier of service, or the restructuring or division of existing tiers of service, or the adjustment of rates as a result of the addition, deletion or substitution of channels pursuant to Section 76.922 of this Subpart, provided that such changes do not constitute a fundamental change in the nature of an existing service or tier of service and are otherwise consistent with applicable regulations.

(c) State and local governments may not enforce state and local consumer protection laws that conflict with or undermine paragraph (a) or (b) of this Section or any other sections of this Subpart that were established pursuant to Section 3 of the 1992 Cable Act, 47 U.S.C. §543.[8]

IV. DISCUSSION

A. Restructured Services Offerings

8. The 1992 Cable Act provides that "[a] cable operator shall not charge a subscriber for any service or equipment that the subscriber has not affirmatively requested by name."[9] Subscribers to the Comcast system did not receive any channel not affirmatively requested. After the changes in question, subscribers received the same number of channels they hadoriginally ordered and the same programming services. Comcast's bills to subscribers contained a separate itemization for the package of WTBS, TNT, The Family Channel and The Nashville Network separate from the charges for the basic and standard tiers. Thus the issue remains whether the unbundling or subdivision of existing offerings into smaller component parts, each with different names or designations, precludes subscribers from being billed for those parts that were not specifically named when service initially was requested. After careful review, we conclude that Comcast's conduct that is the subject of this LOI does not violate the negative option billing provisions of the statute or the Commission's rules.

9. Comcast asserts that these new packages and individual channels offerings are not new services but are simply part of "restructured" or "retiered" offerings of channels that subscribers were receiving prior to the "restructuring." It argues that it followed Commission rules which do not apply the negative option billing prohibition to restructuring that does not result in a fundamental change in the nature of existing tiers of service.[10] In the *Rate Order,* in which 47 C.F.R. § 76.981 initially was adopted, the Commission specifically considered whether subdivision of services in implementing the rate regulation provisions of the 1992 Cable Act would conflict with the negative option restriction. The rule adopted specifically exempts "the restructuring *or division* of existing tiers of service, . . . provided that such changes do not constitute a fundamental change in the nature of an existing service or tier of service and are otherwise consistent with applicable regulations."[11] In formulating this rule, the Commission had been asked to hold that splitting an existing basic tier into a new basic and an expanded basic tier in association with a rate increase would conflict with the negative option billing restriction. The Commission determined that, "restructuring of tiers and equipment, including restructuring appropriate for implementing the Cable Act's provisions, will not bring the negative option billing provision into play if subscribers will continue to receive the same number of channels and the same equipment."[12] An objection to this approach based on a concern that revenue-neutral changes might result in programming being switched to a deregulated tier was rejected.[13] These statements are directly applicable to the type of restructuring undertaken by Comcast.

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[4] 8 FCC Rcd 5631 (1993).
[5] Rate Order, ¶ 440.
[6] *Id.*
[7] *See Id.* at ¶ ¶ 440-441 & n.1105 (the Commission recognized that the 1992 Cable Act did not restrict movement of channels to deregulated status but it doubted that such changes would occur frequently).
[8] 47 C.F.R. §76.981. This section of the rules was initially adopted in the *Rate Order* and was amended in the Commission's *Sixth Order on Reconsideration and Seventh Notice of Proposed Rulemaking in Dockets 92-266 and 93-215,* FCC 94-286 (released November 18, 1994) (*"Sixth Order on Reconsideration"*).
[9] Communications Act of 1934 § 623(f), 47 U.S.C. § 543(f) (1992).
[10] *See* 47 C.F.R. § 76.981.
[11] *Id.* (emphasis added).
[12] *Rate Order* at ¶ 441.
[13] *Id.* at ¶ 440 & n.1105.

10. The Commission's rule is based on the reasonable interpretation of the statute. Of course, the statute could be read to require affirmative consent prior to any change in service, no matter how minor. But in the Commission's view, such an interpretation would contravene Congressional intent and the underlying purposes of the federal cable rate regulations. The Conference Report on the 1992 Cable Act made clear that the federal negative option billing provision was "not intended to apply to changes in the mix of programming services that are included in various tiers of cable service."[14] Thus, Congress never intended for Section 3(f) – the negative option billing prohibition – to apply to every programming change. Moreover, if Section 3(f) were read that broadly, it would thwart a primary purpose of the cable rate rules: "encourag[ing] the provision of new services that subscribers desire at the reasonable rates mandated by Congress."[15] In light of the legislative history and purpose of the 1992 Cable Act, the Commission concluded that Section 3(f) does not apply to minor restructuring of an existing tier. Moreover, and particularly with respect to the retiering that occurred in 1993 upon the initiation of rate regulation pursuant to the 1992 Cable Act, the Commission concluded in 47 C.F.R. § § 76.981 §76.981 that affirmative consent is not required prior to restructuring or division of existing tiers of service that do not result in a fundamental change in the nature of an existing service or tier of service.[16]

11. This interpretation of Commission rules, we believe, protects the interests of subscribers in not being billed for services they have not requested and is necessary to reconcile this provision of the 1992 Cable Act with the rate regulation provisions also adopted therein. The language of Section 3(f) is logically read as permitting subscribers to be billed for a bundle of services "affirmatively ordered by name" even if the name of the service has subsequently changed or that package has been unbundled into smaller component parts; the service received remains the service ordered by name. The words of the section are fairly read as meaning that the purchaser receives what was ordered and not that the name of the service delivered remains unchanged. A different reading could well result in the abrupt withdrawal of service, a result that would be inconsistent with the rate regulation and consumer protection objectives of this section.

12. Further, we believe this is one of those situations that the Commission has previously referenced where state and local officials "may not enforce negative option billing rules that "would obstruct the accomplishment of the objectives of Congress's cable rate provisions."[17] The Commission specifically contemplated that, as part of the process of complying with the initial introduction of rate regulation, cable operators would have the flexibility and in some cases be required to retier, divide, or unbundle their service offerings on a faster than usual schedule without complying, for example, with notice or other requirements generally applicable.[18]

13. The concern of Section 3(f) as a consumer protection mechanism is that subscribers not be billed for services that they never ordered. The restrictions of this provision protect subscribers from having to take on the burden of identifying and negatively responding to charges for services that appear on a bill that are not desired and for which no request has been made. It protects subscribers both from inadvertent payment of such charges and from becoming contractually bound for them. Thus, when the service received is not altered, but rather is simply unbundled, the above interpretation is consistent with the achievement of this objective. It protects subscribers from receiving what has not been ordered; but it does not mandate cutting off what has been ordered. To cut off service requested offends the contractual relationship between buyer and seller as much as does adding service not requested. This is especially true when the restoration of service that has been terminated imposes an additional expense on the subscriber for termination or resubscription charges.

14. While we conclude that there was no violation of the prohibition against negative option billing here, we note that the restructuring done in this case by Comcast was necessarily done in a situation occasioned by the inception of rate regulation where time was short due to statutory deadlines leading to fundamental industry change. In contrast, creation of new product tiers, (tiers specifically provided for in the Sixth Order on Reconsideration that may be made up of channels that were offered on the basic or cable programming service tiers for a period of time) will come in a more settled environment where operators will be able to take the time necessary to accomplish effective affirmative marketing.[19] Accordingly, Commission rules expressly provide for the affirmative marketing of new product tiers.[20]

B. Wire Maintenance Service Plan

15. The Commission's rules under the 1992 Cable Act required a variety of changes in the nature of the services to be marketed by cable operators. One such change is the requirement to unbundle equipment and installation from programming. The Commission stated "unbundling rates for equipment, installation, and additional outlets from the rates for basic service best comports with our Congressional mandate."[21] Because the statute sets out different standards for evaluating equipment and basic cable service rates the Commission required that the rates for each must be unbundled from each other.[22] Section 76.923(b) of the rules states "[a] cable operator shall establish rates for remote control units, converter boxes, other customer equipment, installation, and additional connections sepa-

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[14] H.R. Rep. No. 862, 102d Cong., 2d Sess. at 65 (1992).

[15] *Sixth Order on Reconsideration* at ¶ 118.

[16] *See Amicus Curiae* Brief of the Federal Communications Commission, *Time Warner Cable v. James E. Doyle*, No. 94-1894, 7th Cir. Ct. App.

[17] *Sixth Order on Reconsideration* at ¶ 119.

[18] As the Commission previously stated " it is indisputable that a delay of rate regulation for all cable systems and for all subscribers . . . would undercut the congressional mandate that cable rates be regulated and the underlying congressional determination that such rate regulation is in the public interest." *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking* in Docket 92-266, FCC 93-389 (released July 27, 1993) (preempting conflicting notice provisions) and *Order* in Docket 92-266, FCC 93-266 (released May 14, 1993) (preempting conflicting notice provisions).

[19] *Sixth Order on Reconsideration* at ¶ ¶ 22-37.

[20] *Id.* at ¶ 29.

[21] *Rate Order* ¶ 287.

[22] *Id.*

rate from rates for basic tier service. In addition, the rates for such equipment and installations shall be unbundled one from the other."

16. While the reasonableness of an operator's equipment and service charges is within the jurisdiction of the local franchise authority, here the issue is solely whether Comcast complied with the negative option billing prohibition when it billed its customers for the wire maintenance plan.[23] Comcast claims that prior to September 1, 1993, wire maintenance service was included in Comcast's charges for the basic service tier. After September 1, 1993, Comcast charged subscribers separately for a wire maintenance service plan priced at $.45 per month. We believe that Comcast's separate itemization of this charge on subscriber bills was simply compliance with Commission rules requiring unbundling. Comcast's subscribers continued to receive the same level of service before and after Comcast unbundled its equipment rates. In light of this and our analysis above of Comcast's tier restructuring, we conclude that Comcast, with respect to its wire maintenance service plan, did not violate the federal negative option billing restrictions, Section 3(f) of the 1992 Cable Act.

V. ORDERING CLAUSES

17. Accordingly, IT IS CONCLUDED that Comcast Cablevision of Tallahassee, Florida has not, with respect to its restructured service offering billing practices, violated Section 623(f) of the Communications Act of 1934, as amended, 47 U.S.C. § 543(f), or Section 76.981 of the Commission's rules, 47 C.F.R. § 76.981.

18. IT IS FURTHER CONCLUDED that Comcast Cablevision of Tallahassee, Florida has not, with respect to its wire maintenance service plan, violated Section 623(f) of the Communications Act of 1934, as amended, 47 U.S.C. § 543(f), or Section 76.981 of the Commission's rules, 47 C.F.R. § 76.981.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[23] Further, this Order does not address the legality of, or any other issue relating to, the wire maintenance plan itself.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Horry Telephone Cooperative, Inc. and Horry County, South Carolina — C294-PP0002-UP

Petition for Approval of Upgrade Incentive Plan

MEMORANDUM OPINION AND ORDER

Adopted: January 20, 1995; Released: January 20, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. In this Order we grant the Upgrade Incentive Plan of Horry Telephone Cooperative, Inc. (HTC) and Horry County, South Carolina (Horry County). HTC and Horry County (hereinafter referred to jointly as the "Parties") filed a joint petition for approval of their Upgrade Incentive Plan Agreement on August 9, 1994; the joint petition was placed on public notice,[1] and a pleading cycle established. No comments were received. At the Bureau staff's request, HTC provided supplemental information including estimated costs of the proposed upgrade, and a cost recovery plan on October 31, 1994.

II. BACKGROUND

2. In its March 1994 Order (*Cost Order*) establishing interim regulations for cost of service filings,[2] the Commission adopted on an experimental case-by-case basis an Upgrade Incentive Plan to provide an opportunity for developing a type of "social contract" between customers and operators under which rates for existing services are frozen or limited to changes permitted by the benchmark/price cap approach, while the quality of service is at least maintained if not increased. Operators are then allowed substantial pricing flexibility for new services and capabilities. Such plans are to remain in effect for a fixed period, and offer the operator an opportunity to earn higher profits as an incentive and reward for successful innovations.[3] The Commission intended that such plans would provide greater assurance of reasonable, stable rates to customers for existing services, while also generating profit incentives to operators to upgrade their systems in cost-effective ways that would benefit subscribers.[4]

III. DISCUSSION

3. HTC is a non-profit, cooperative that provides cable television to approximately 14,800 member/subscribers in unincorporated areas within the cable franchising jurisdiction of Horry County. Since February 13, 1994, Horry County has been certified to regulate the basic tier rates of HTC. On August 8, 1994, HTC and Horry County entered into the Upgrade Incentive Plan Agreement and filed a joint petition for approval of the Upgrade Incentive Plan Agreement with the Commission.

4. In their joint Petition the Parties state that over an approximately two-year period, HTC will invest more than $8 million to install approximately 200 miles of fiber optic plant throughout its existing Horry County cable system and to increase the bandwidth of these systems from 220 MHz to 550 MHz. HTC and Horry County state that the upgrades will substantially improve the signal quality available to member/subscribers and will increase the number of available premium and non-premium program services from 22 to 47.

5. The Parties indicate that the upgraded 550 MHz system will offer member/subscribers a 14-channel basic service tier at a monthly charge of $10.00, a 26 channel cable programming service tier at a monthly charge of $12.50, five non-regulated premium channels, and two non-regulated pay per view channels. HTC and Horry County state that the system upgrade will replace the existing 220 MHZ system which offers member/subscribers a single 19 channel basic service tier at a monthly charge of $15.50, plus three non-regulated premium channels. The Parties stated that a smaller basic service tier (14 channels rather than 19 channels) will be offered on the upgraded 550 MHz system in response to request by member/subscribers for a limited, low-cost basic tier similar to those provided by neighboring cable systems. The Parties further submit that HTC's Board of Directors, which is elected by the member/subscribers to represent their interests, have unanimously approved the upgrade plan.

6. The Parties state that customers' rates set for the 220 MHz system basic service tier ($15.50) will be frozen until such time as the upgrade is completed in their area and they are cut over to the 550 MHz system. The rates for the 550 MHz system 14 channel basic service tier ($10.00) and the 26 channel cable programming service tier ($12.50) will be frozen until such time as the entire upgrade is completed and all member/subscribers have been transferred to the 550 MHz system. Thereafter, the Upgrade Incentive Agreement provides that after the upgrade is completed, and all member/subscribers have been transferred to the 550 MHz system, HTC will be permitted to

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[1] *See Public Notice, Horry Telephone Cooperative, Horry County Submit Joint Petition for Approval of Upgrade Incentive Plan for Cable Services Rates,* File No. C294-PP0002-UP (released October 25, 1994). Pursuant to the Public Notice initial comments in this proceeding were to be filed no later than November 24, 1994 with reply comments to be filed no later than December 9, 1994.

[2] *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MMDocket No. 93-215, Report and Order and Further Notice of Proposed Rulemaking,* 9 FCC Rcd 4527 (1994).

[3] *Id.* at Paras. 295-304.

[4] *Id.*

modify its basic service tier and cable programming service tier rates in accordance with the Commission's cable television price cap mechanism, subject to appropriate Horry County and Commission review. Furthermore, the Parties stated that HTC's installation and lease charges for equipment used by member/subscribers to receive regulated services will be unbundled and based upon actual cost in accordance with the calculations set forth in FCC Form 1205. Finally, the Parties indicate that the Upgrade Incentive Plan will remain in effect for four years, until August 8, 1998.

7. HTC supplemental filing of its cost and cost recovery plan for the proposed upgrade estimated that its revenue requirement for recovery of total system cost, upon completion of the upgrade project, will be $4,800,000 and that these costs will be allocated among the basic tier ($1,888,043), the cable programming service tier ($2,329,891) and the non-regulated services ($582,065). In its supplemental filing HTC did not disclose its method of allocation; however, the Commission sees no reason to suspect it is not reasonable, given the fact that HTC is a non-profit organization, that the Board of Directors is comprised of subscribers who are elected by subscribers, and that the system is subscriber owned. In addition, the fact that Horry County, the local franchising authority, joined in the petition for upgrade approval lends additional credence to the fact that HTC's estimates are reasonable. We will not second guess these judgments here.

8. Based on the pleadings in this proceeding, we find that the Parties' petition for approval of their Upgrade Incentive Plan complies with the objectives set forth in the *Cost Order*. The upgrades will directly benefit member/subscribers by improving the signal quality available and by increasing the number of available premium and non-premium program services from 22 to 47; the composition and price of HTC's current basic service tier will be frozen for the duration of the upgrade; upgrade rate increase will not be assessed on member/subscribers until the upgrade is complete and providing benefits to customers of the regulated services. In addition, the Upgrade Incentive Plan has the full support of the local franchising authority, Horry County.

9. It is our belief that by approving this Upgrade Incentive Plan we encourage upgrades that provide additional service tiers that are economically justified and that best meet customers' needs. In addition, approval of this plan will reduce regulatory burdens on all parties. Therefore, we find this plan to be in the public interest and approve it.

IV. CONCLUSION

10. Accordingly, IT IS ORDERED that the Upgrade Incentive Plan between Horry Telephone Cooperative, Inc., and Horry County, South Carolina, IS APPROVED.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

LAKE CABLEVISION, INC.

Petition for Revocation

of the Certification of
Gwinnett County, Georgia,
to Regulate Basic Cable Service Rates
(GA0673)

MEMORANDUM OPINION AND ORDER

Adopted: January 19, 1995; Released: January 20, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On January 28, 1994, Lake Cablevision Inc. ("Lake") filed a petition for revocation challenging the certification of Gwinnett County, Georgia ("the County"),[1] Georgia, to regulate rates for basic cable service and associated equipment. In addition, Lake submitted clarifying information in response to a Bureau request. The City filed a response to Lake's petition in which the City indicated that it does not oppose Lake's petition.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators which are not subject to effective competition.[2] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition unless the franchise authority has actual knowledge to the contrary.[3] Such certification becomes effective 30 days from the date of filing unless the Commission finds that the authority does not meet the statutory certification requirements.[4] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days from the date such certification becomes effective.[5] Rate regulation is automatically stayed pending review of a timely-filed petition for reconsideration alleging the presence of effective competition.[6] After the 30-day deadline for filing petitions for reconsideration has elapsed, cable operators may challenge the franchising authority's certification by filing a petition for revocation. However, regardless of its grounds, a petition for revocation does not automatically trigger a stay of the franchising authority's power to regulate basic rates.[7]

II. DISCUSSION

3. Lake argues that its system serving the unincorporated areas of Gwinnett County, its franchise area, is subject to effective competition because the system serves fewer than 30 percent of the households within its franchise area.[8] Lake states that its franchise area has approximately 100,557 households (that is, occupied housing units)[9] and it "currently serves 3,543 of those households which represents about 3.5 percent of the households in the franchise area." As support, Lake submits a statement explaining that it calculated the number of households in its franchise area by taking the total number of households in Gwinnett County (126,971) and deducting the total number of households for the incorporated areas of the County.[10] This yielded a total of 100,557 households. In addition, Lake submits a declaration under penalty of perjury from the Vice-President of the corporation who verifies that the cable system had 3,543 subscribers in the unincorporated areas of Gwinnett County as of January 28, 1994.[11]

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[1] The County filed its Certification of Franchising Authority to Regulate Basic Cable Rates and Initial Finding of Lack of Effective Competition ("FCC Form 328") on October 15, 1993. Its certification became effective on November 14, 1993.

[2] Communications Act of 1934 § 623 (a)(4), 47 U.S.C. § 543(a)(4).

[3] 47 CFR § 76.906, 76.910(b)(4).

[4] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, and the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition. 47 C.F.R. § 76.910(b). *See also* 47 U.S.C. § 543(a)(4).

[5] 47 C.F.R. §§1.106, 76.911, *Report and Order and Further Notice of Proposed Rulemaking*, in MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[6] 47 C.F.R. § 76.911(c).

[7] 47 C.F.R. § 76.914 (d).

[8] The Cable Act (Communications Act of 1934 § 623 (a)(2) 47 U.S.C. § 534 (a)(2)) and the Commission's rules (47 C.F.R. § 76.905 (a)) provide that only the rates of cable systems that are not subject to effective competition may be regulated. One of the bases by which a cable system will be deemed subject to effective competition is if fewer than 30 percent of the households in the system's franchise area subscribe to the cable service of the system. Communications Act of 1934 § 623 (l)(1)(A), 47 U.S.C. § 543 (l)(1)(A); 47 C.F.R. § 76.905 (b)(1).

[9] As the Commission noted recently, "we presume that Congress did not intend "households" to have a different meaning than in the 1990 Census that would include vacant units." *Third Order on Reconsideration*, in MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994). The term "household" is defined by Census Bureau to include only occupied housing units. *See* Bureau of the Census, Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8.

[10] Thus, from a total of 126,971 households, Lake deducted the number of households in Buford City, Buford Division (3,040); Rest Haven town (55); Sugar Hill City (1,550); Buford City (209); Dacula City (737); Lawrenceville City (5,891); Suwanee City (19); Lilburn City (3,430); Berkeley Lake City (297); Norcross City (2,298); Grayson City (193); Lawrenceville City (293); Loganville City (151); Snellville City (3,940); Duluth City 3,486); Sugar Hill City (75); Suwanee City (750), thereby yielding 100,557 households.

[11] Declaration of Turner O. Waide, Vice President, Lake Cablevision, Inc. dated January 17, 1995.

4. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[12] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's Rules, exists in the franchise area.[13] Lake has met this burden. Lake appropriately relied on data reflecting the number of households as required by our rules.[14] Relying on this data, Lake has submitted sufficient evidence demonstrating that its cable system serving the unincorporated areas of Gwinnett County, its franchise area, serves 3,543 of the 100,557 households, or 3.5 percent of the households within its franchise area. Accordingly, its petition is granted.

III. ORDERING CLAUSES

5. Accordingly, IT IS ORDERED that the petition for reconsideration filed by Lake Cablevision, Inc. challenging the certification of Gwinnett County, Georgia, to regulate its basic cable service IS GRANTED.

6. IT IS FURTHER ORDERED that the certification granted to Gwinnett County, Georgia to regulate Lake Cablevision, Inc., basic cable rates IS RESCINDED.

7. This action is being taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[12] 47 C.F.R. § 76.906.
[13] 47 C.F.R. § 76.911(b)(1).
[14] *Third Recon Order, supra.*

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TEL-COM, INC.

Petition for Reconsideration
of Certification

of the certification of the West
Virginia Cable Television Advisory
Board to regulate basic cable rates
(WV0630 & WV0628)

MEMORANDUM OPINION AND ORDER

Adopted: January 20, 1995; Released: January 20, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On November 17, 1993, Tel-Com, Inc. ("Tel-Com") filed a timely Petition for Reconsideration of Certification challenging the certification of the West Virginia Cable Television Advisory Board (the "Board") to regulate rates for basic cable service and associated equipment in portions of Mingo County, West Virginia (WV0630) and the City of Matewan, West Virginia (WV0628).[1] On December 30, 1993, the Board filed a Response to Petition for Reconsideration of Tel-Com, Inc, to which Tel-Com filed a Reply.[2] At the Commission's request, Tel-Com filed additional information on November 28, 1994.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators that are not subject to effective competition as defined in the Communications Act of 1934, as amended.[3] For purposes of the initial request for certification, franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to such effective competition, unless they have actual knowledge to the contrary.[4] Certification becomes effective 30 days from the date of filing unless the Commission finds that the franchising authority does not meet the certification requirements.[5] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days from the date such certification becomes effective.[6] Rate regulation is automatically stayed pending review of a timely-filed petition for reconsideration alleging the presence of effective competition as defined in the Communications Act of 1934, as amended.[7]

II. DISCUSSION

Facts

3. In its Petition, Tel-Com argues that its cable system is subject to effective competition[8] as defined in the Communications Act of 1934, as amended, because: "1) at least 50% of the households in Tel-Com's franchise area have access to another unaffiliated [multichannel video programming distributor], in this case Triax Communications Corporation ("Triax"); and 2) at least 15% of those households subscribe to Triax's cable service."[9] Tel-Com states that it provides cable television service in Mingo County, West Virginia and the City of Matewan, West Virginia "[p]ursuant to two separate franchise agreements."[10] Tel-Com claims that it passes approximately 1500 "homes" and serves a total of 849 subscribers in an area which includes a portion of its Mingo County franchise area and a portion of its Matewan franchise area.[11] According to Tel-Com, although it has county-wide franchise operating rights, it is not obligated to serve all of Mingo County. Tel-Com asserts that its de facto franchise area for purposes of determining whether effective competition as defined in the Commu-

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[1] The Board filed its "Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Lack of Effective Competition" ("FCC Form 328") on October 18, 1993, which became effective November 17, 1993.

[2] Under West Virginia law, the Board has the sole authority to regulate cable rates in the State of West Virginia. W. Va. Code §§5-18-1 *et seq.*

[3] Communications Act of 1934 §623(a)(4), 47 U.S.C. §543(a)(4).

[4] 47 C.F.R. §§76.906, 76.910(b)(4).

[5] 47 C.F.R. §76.910(e). Certification becomes effective unless the Commission determines that: 1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; 2) the franchising authority lacks the legal authority to adopt, or personnel to administer, rate regulations; 3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or 4) the cable system in question is subject to effective competition.47 C.F.R. §76.910(b). *See also* 47 U.S.C. §543(a)(4).

[6] 47 C.F.R. §§1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993) (*"Rate Order"*).

[7] 47 C.F.R. §76.911(c).

[8] The Cable Act and the Commission's rules provide that only the rates of cable systems that are not subject to effective competition may be regulated. Communications Act of 1934 §623(a)(2), 47 U.S.C. §543(a)(2); 47 C.F.R. §76.905(a). One of the bases on which a cable system is deemed subject to effective competition is if the franchise area is: 1) served by at least two unaffiliated multichannel video programming distributors each of which offers comparable programming to at least 50 percent of the households in the franchise area; and 2) the number of households subscribing to multichannel video programming other than the largest multichannel video programming distributor exceeds 15 percent of the households in the franchise area. Communications Act of 1934 §623(l)(1)(B), 47 U.S.C. §543(l)(1)(B); 47 C.F.R. §76.905(b)(2).

[9] Tel-Com Petition at 2.

[10] Tel-Com Petition at 1.

[11] Tel-Com states that its service to Matewan is ". . . part of its adjacent operations in Pike County, Kentucky." Tel-Com Petition at 1-2.

nications Act of 1934, as amended, exists is the area containing the 1500 homes passed in the portions of Mingo County and Matewan that Tel-Com currently serves. Tel-Com states that, in this area (consisting of portions of two separate franchise areas), its competitor, Triax, passes 50 percent of the homes and provides service to more than 15 percent of those households. Tel-Com bases this claim on its "estimate" of Triax's cable plant in this particular area.

4. The Board in its Response opposes Tel-Com's effective competition claim. The Board first argues that Tel-Com inappropriately redefined its franchise area because the issue of franchise area redefinition is applicable solely to another of the three tests for effective competition as defined in the Communications Act of 1934, as amended, namely the "low penetration" effective competition test.[12] Next, the Board argues that the Commission intended the issue of franchise area redefinition to be left solely to the prerogative of the franchising authority and that cable operators are prohibited from raising the issue. Tel-Com filed a Reply to the Board's Response arguing that the Board's Response is untimely and should be dismissed, as well as opposing the Board's arguments.[13]

Disposition of Tel-Com's Effective Competition Claim

5. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition as defined in the Communications Act of 1934, as amended.[14] The cable operator bears the burden of rebutting the presumption that such effective competition does not exist and so must provide evidence sufficient to demonstrate that effective competition, as defined by Section 76.905 of the Commission's rules, is present within the franchise area.[15] Tel-Com has failed to meet this burden.

6. Tel-Com's claim is not appropriately based on a franchise area as that term has been defined by the Commission. The 1992 Cable Act defines each of the three alternative effective competition tests in terms of the franchise area.[16] Thus, the Commission has determined that a claim of effective competition must be demonstrated on a franchise area-by-franchise area basis.[17] The Commission has generally defined the term "franchise area" as "the area a system operator is granted authority to serve in its franchise."[18] The Commission has recognized a limited exception to this general rule. Specifically, the Commission stated that "a more restricted franchise area definition" may be appropriate under limited circumstances, such as when an operator "has itself, through its own conduct, self-defined the areas to be served to such an extent that this redefined area accurately portrays the operator's 'franchise area.'"[19]

7. Tel-Com bases its case on this redefined franchise area exception. Tel-Com contends that its redefined franchise area is an area consisting of approximately 1500 homes located in a portion of Mingo County and a portion of Matewan. Tel-Com misapplies the redefined franchise area exception.

8. In the *First Reconsideration Order,* while generally reaffirming its conclusion that the presence of effective competition as defined in the Communications Act of 1934, as amended, would be evaluated on a franchise area basis, the Commission recognized that there might be situations where the relevant area for purposes of such effective competition might be something less than the entire legally authorized franchise area.[20] In explaining the application of this exception, the Commission offered the example of a situation where a cable operator has "county-wide operating rights but has determined to serve only a specific named community within that area."[21] Thus, in creating the franchise area redefinition exception, the Commission clearly intended to address situations where a cable operator has a single franchise to serve a larger area, but has made an affirmative decision to serve only a portion thereof. This is not the situation in this case. Here, Tel-Com is not claiming that it has redefined its franchise area to constitute a portion of its larger authorized area. Rather, Tel-Com has attempted to make its effective competition claim based on portions of two separate franchise areas. After creating this alleged redefined franchise area, Tel-Com claims that it faces effective competition as defined in the Communications Act of 1934, as amended, therein from another cable operator. Tel-Com points to nothing in the 1992 Cable Act or our rules that indicates that either Congress or the Commission intended or contemplated that a cable operator could claim effective competition across franchise area lines. Unlike the exception contemplated by the Commission, Tel-Com does not seek to demonstrate the presence of effective competition in an area redefined within one particular franchise area. Rather, the area in which

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[12] The Commission's low penetration effective competition test provides that a cable system is subject to effective competition if fewer than 30 percent of the households in the system's franchise area subscribe to the system's service. Communications Act of 1934 §623(l)(1)(A), 47 U.S.C. §543(l)(1)(A); 47 C.F.R. §76.905(b)(1).

[13] Because we can dispose of Tel-Com's Petition without reference to the arguments raised in the Board's Response, we need not address Tel-Com's request that the Board's Response be dismissed as untimely filed.

[14] 47 C.F.R. §76.906.

[15] 47 C.F.R. §76.911(b)(1).

[16] *See* Communications Act of 1934 §623(l)(1)(A), 47 U.S.C. §543(l)(1)(A) (under the low penetration test, cable operators are deemed subject to effective competition if "fewer that 30 percent of the households in the franchise area subscribe to the cable service of a cable system."); Communications Act of 1934h)§623(l)(1)(B), 47 C.F.R. §543(l)(1)(B) (under the competitive provider test, cable operators are deemed subject to effective competition if "the franchise area is (i) served by at least two unaffiliated multichannel video programming distributors each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (ii) the number of households subscribing to programming services offered by multichannel video programming distributors other than the largest multichannel video programming distributor exceeds 15 percent of the households in the franchise area."); Communications Act of 1934 §623(l)(1)(C), 47 U.S.C. §543(l)(1)(C) (under the municipal provider test, cable operators are deemed subject to effective competition if "a multichannel video programming distributor operated by the franchising authority for that franchise area offers video programming to at least 50 percent of the households in that franchise area.").

[17] *See Rate Order* at 5672.

[18] *First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking,* MM Docket No. 92-266, 9 FCC Rcd 1164 (1994) (*"First Reconsideration Order"*).

[19] *Id.* at 1181.

[20] The Commission stated that "there may be some limited situations where use of a more restricted 'franchise area' definition may be both appropriate and consistent with the statutory language." *Id.*

[21] *Id.*

Tel-Com contends it is subject to effective competition is drawn from portions of two separate franchise areas. The aggregation of portions of two distinct franchise areas cannot be inferred from the limited exception recognized by the Commission.[22]

9. In light of these facts, we find that Tel-Com inappropriately relied upon consolidated data from portions of two independent franchise areas to support its effective competition claim. In order to demonstrate effective competition, Tel-Com should have used data applicable solely to its Mingo County franchise area, or to its Matewan franchise area.[23] In light of Tel-Com failure to do so, we must deny its Petition.

10. Finally, we note that, in enacting the 1992 Cable Act, it was Congress' policy "to promote the availability to the public of a diversity of views and information;" and to "rely on the marketplace, to the maximum extent feasible, to achieve that availability."[24] In this case, Tel-Com argued that its cable system was subject to effective competition as defined in the 1992 Cable Act. However, because Tel-Com failed to support this effective competition claim, we deny its Petition. Nonetheless, we take this occasion to state our view that in the case of the cable programming service tiers ("CPSTs") there may be circumstances where a cable system, although not subject to effective competition as defined in the 1992 Cable Act, may be charging cable rates that are constrained by the presence of one or more other multichannel video programming distributors ("MVPD") in the franchise area. In such situations, the presence of one or more such MVPDs may ensure that the rates the operator charges subscribers for CPSTs are not "unreasonable." In such instances, the public interest may be served by relying on the market forces instead of our rate rules to ensure that the operator's rates are not "unreasonable."[25] In this case, Tel-Com has not submitted sufficient economic analysis and evidence regarding its competitor's presence in its franchise area or any other market forces to allow us to determine that its rates are constrained by competition. Should Tel-Com or any other operator choose to submit information pertaining to the impact of competitive market forces on its rates, we could consider such a showing in the context of a petition for special relief filed pursuant to Section 76.7 of the Commission's rules.[26]

III. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED that the Petition for Reconsideration filed by Tel-Com, Inc. challenging theCertification of the West Virginia Cable Television Advisory Board applicable to portions of Mingo County, West Virginia (WV0630) and the City of Matewan, West Virginia (WV0628) IS DENIED.

12. IT IS FURTHER ORDERED that the automatic stay imposed by Section 76.911(c) of the Commission's rules,[27] as amended, IS TERMINATED.

13. IT IS FURTHER ORDERED that Tel-Com SHALL FILE the required rate justifications on the applicable forms with the West Virginia Cable Television Advisory Board within thirty days of the release date of this *Memorandum Opinion and Order* or within thirty days of receipt of notice from the West Virginia Cable Television Advisory Board that it is regulating Tel-Com's rates in these franchise areas, whichever is later.

14. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's rules, as amended.[28]

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[22] *Cf. In Re:* Summit Communications, *Inc.*, 9 FCC Rcd 4833 (1994) (low penetration effective competition petition denied which contained consolidated information applicable to two separate franchise areas served by the same cable operator).

[23] It is unclear to the Commission why Tel-Com decided to base its effective competition claim upon consolidated data from portions of two independent franchise areas. It is also unclear, based on the information submitted by Tel-Com, whether it could satisfy any of the effective competition tests based on information applicable solely to either of its independent franchises.

[24] *See* Cable Television Consumer Protection and Competition Act of 1992 § 2(b), Pub. L. No. 102-385, 106 Stat. 1460.

[25] *Cf. Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992; Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking,* MM Docket Nos. 92-266 and 93-215, FCC 94-286, ¶ ¶ 16-37 (adopted: November 10, 1994).

[26] 47 C.F.R. §76.7.

[27] 47 C.F.R. §76.911(c).

[28] 47 C.F.R. §0.321.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: January 20, 1995

CABLE SERVICES BUREAU ANNOUNCES EXTENSION OF TIME TO FILE UNDER OPTIONAL PROCEDURES PLAN WITH RESPECT TO PENDING PRE-MAY 15 BENCHMARK CASES

In response to requests from industry representatives, including the National Cable Television Association, the Cable Services Bureau is extending its optional procedures filing deadline with respect to pre-May 15 Benchmark cases from January 24, 1995 to February 7, 1995. This extension is being offered to accommodate those system operators who wish to use the optional procedures plan outlined in FCC Public Notice DA 94-1556 but who are unable to meet the original deadline.

Operators who are able to file by the originally announced due date of January 24, 1995, are encouraged to do so. We do not expect that further extensions of this due date will be granted.

For further information concerning the Optional Procedures please refer to FCC Public Notice DA-94-1556, *Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, dated December 29, 1994.

For further information concerning this Public Notice contact Jeffrey Steinberg or Eli Johnson of the Cable Services Bureau at (202) 416-0800.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Island Broadcasting, Inc. against Guam Cable TV — CSR-4134-M

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: January 20, 1995; Released: January 20, 1995

By the Chief, Cable Services Bureau:

1. On October 12, 1993, Island Broadcasting, Inc., licensee of station KTGM, Tamuning, Guam ("Island"), filed a must-carry complaint with the Commission against Guam Cable TV ("Guam Cable") pursuant to § 614 of the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act of 1992"), 47 CFR § 76.56, and 47 CFR § 76.7. In its complaint, Island states that Guam Cable operates a cable television system on the island of Guam, a U.S. territory. Island also states that KTGM is located in the same ADI as Guam Cable. Island states that it is entitled to must-carry status on Guam Cable pursuant to § 614 of the Cable Act of 1992 and 47 CFR § 76.56. Island requests that the Commission order Guam Cable to carry its signal on channel 14 of its system, and that Guam Cable provide dual carriage of KTGM on channels 9 and 14 until such time as Guam Cable removes all traps inhibiting reception of channel 14. No opposition to this complaint has been filed.

2. The Commission has clearly delineated the responsibilities of cable operators providing carriage of must-carry signals.[1] In the *Order*, the Commission determined that "... all local commercial television stations carried in fulfillment of the must-carry requirements must be provided to *every* subscriber and must be viewable on *all* television sets that are connected to the cable system by a cable operator or for which the cable operator provides a connection" (emphasis added).[2]

3. Island's complaint establishes that it is entitled to carriage on channel 14 of Guam Cable's system. We do not believe it is necessary to mandate dual carriage of KTGM on channels 9 and 14. However, the Commission takes this opportunity to remind Guam Cable of its responsibility under our must-carry rules to provide every subscriber with a viewable signal. Should this require dual carriage of KTGM on channels 9 and 14, we would expect Guam Cable to do so until such time as it removes all traps inhibiting reception of channel 14. The complaint filed October 12, 1993 by Island IS GRANTED in accordance with § 614(d)(3)(47 U.S.C. §534) of the Communications Act of 1934, as amended, and Guam Cable IS ORDERED to provide carriage of Station KTGM, Tamuning, Guam on channel 14 of its cable system forty-five (45) days from the release date of this Order. This action is taken by the Chief, Cable Services Bureau, pursuant to 47 CFR § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

[1] *Report and Order* in MM Docket No. 92-259, 8 FCC Rcd 2965, 2974 (1993) (*"Order"*).
[2] *Id.*

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Century Cable TV LOI-93-18
Muncie, IN

Letter of Inquiry

ERRATUM

Released: January 23, 1995

By the Chief, Cable Services Bureau:

This Erratum corrects an inadvertent error in an ordering clause in the *Memorandum Opinion and Order* issued in the Letter of Inquiry proceeding concerning Century Cable TV of Muncie, Indiana ("Century"), LOI-93-18, DA 94-1354 (released December 2, 1994). In this regard, paragraph 22 is corrected to read as follows:

> 2. Accordingly, IT IS ORDERED that Century's package as it existed on December 13, 1993, may be treated as a new product tier under our *Going Forward Order*.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Century Cable TV LOI-93-39
Yuma, AZ

Letter of Inquiry

ERRATUM

Released: January 23, 1995

By the Chief, Cable Services Bureau:

This Erratum corrects an inadvertent error in an ordering clause in the *Memorandum Opinion and Order* issued in the Letter of Inquiry proceeding concerning Century Cable TV of Yuma, Arizona ("Century"), LOI-93-39, DA 94-1360 (released December 2, 1994). In this regard, paragraph 22 is corrected to read as follows:

> 22. Accordingly, IT IS ORDERED that Century's package as it existed on December 13, 1993, may be treated as a new product tier under our *Going Forward Order*.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Century Cable TV LOI-93-45
Owensboro, KY

Letter of Inquiry

ERRATUM

Released: January 23, 1995

By the Chief, Cable Services Bureau:

This Erratum corrects an inadvertent error in an ordering clause in the *Memorandum Opinion and Order* issued in the Letter of Inquiry proceeding concerning Century Cable TV of Owensboro, Kentucky ("Century"), LOI-93-45, DA 94-1361 (released December 2, 1994). In this regard, paragraph 22 is corrected to read as follows:

> 22. Accordingly, IT IS ORDERED that Century's package as it existed on December 13, 1993, may be treated as a new product tier under our *Going Forward Order*.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CAROLINA CABLE PARTNERS

Petition for Revocation

of the Certification of
Moore County, North Carolina,
to Regulate Basic Cable Service Rates
(NC0792)

MEMORANDUM OPINION AND ORDER

Adopted: January 20, 1995; Released: January 23, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On December 20, 1993, Carolina Cable Partners ("Carolina") submitted a petition challenging the certification of Moore County, North Carolina[1] to regulate the system's rates for basic cable service and associated equipment.[2] In addition, Carolina filed clarifying information in response to Bureau requests. Moore County did not file an opposition.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators which are not subject to effective competition.[3] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition unless the franchise authority has actual knowledge to the contrary.[4] Such certification becomes effective 30 days from the date of filing unless the Commission finds that the authority does not meet the statutory certification requirements.[5] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days of the date such certification becomes effective.[6] Regulation of rates is automatically stayed pending review of a timely filed petition for reconsideration alleging effective competition.[7] After the 30-day deadline for filing petitions for reconsideration has elapsed, cable operators may challenge the franchising authority's certification by filing a petition for revocation.[8] However, regardless of its grounds, a petition for revocation does not automatically trigger a stay of the franchising authority's power to regulate basic rates.[9]

II. DISCUSSION

3. Carolina argues that its cable system is subject to effective competition because it serves fewer than 30 percent of the households in the unincorporated areas of Moore County, its franchise area.[10] Carolina Cable's pleadings indicate that it serves 438 subscribers in the unincorporated areas of Moore County which areas have 14,043 households. This yields a penetration level of 3.1 percent. As supporting documentation, Carolina Cable submits a copy of the 1990 Census Summary File Tape which indicates that there are a total of 23,827 households (*i.e.*, occupied housing units)[11] in Moore County. In addition, Carolina Cable submits a letter from the Director of the Moore County Planning and Community Development, which states that there are a total of 14,043 households in the unincorporated areas of Moore County. Carolina Cable also submits a subscriber report which indicates that it currently has 438 subscribers. Finally, Carolina Cable sub-

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[1] Moore County filed its Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Effective Competition ("FCC Form 328") on September 20, 1993. Its certification became effective on October 20, 1993.

[2] Carolina filed a pleading styled as a "petition for reconsideration." We note, however, that Moore County's certification was filed with the Commission on September 20, 1993, and became effective on October 20, 1993. Thus, a petition for reconsideration challenging Moore County's certification must have been filed no later than November 18, 1993. *See* 47 C.F.R.§§1.106, 76.911 , *Report and Order and Further Notice of Proposed Rulemaking*, in MM Docket No. 92-266, 8 FCC Rcd 5631, 5693, (1993)(Rate Order). Moore County's petition was not filed until December 20, 1993, one month after the period for filing petitions for reconsideration had elapsed. Because Moore County's petition for reconsideration is untimely, it will be treated as a petition for revocation.

[3] Communications Act of 1934 § 623 (a)(4), 47 U.S.C. § 543(a)(4).

[4] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[5] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, and the personnel to administer, rate regulations; or (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition.47 C.F.R. § 76.910(b). *See also* 47 U.S.C. § 543(a)(4).

[6] 47 C.F.R. §§ 1.106, 76.911, *Report and Order and Further Notice of Proposed Rulemaking*, in MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[7] 47 C.F.R. § 76.911(c).

[8] 47 C.F.R. § 76.914.

[9] 47 C.F.R. § 76.914 (d).

[10] The Cable Act (Communications Act of 1934 § 623 (a)(2) 47 U.S.C. § 534 (a)(2)) and the Commission's rules (47 C.F.R. § 76.905 (a)) provide that only the rates of cable systems that are not subject to effective competition may be regulated. One of the bases by which a cable system will be deemed subject to effective competition is if fewer than 30 percent of the households in the system's franchise area subscribe to the cable service of the system. Communications Act of 1934 § 623 (l)(1)(A), 47 U.S.C. § 543 (l)(1)(A); 47 C.F.R. § 76.905 (b)(1).

[11] *Third Order on Reconsideration*, in MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994). As the Commission noted recently, "we presume that Congress did not intend "households" to have a different meaning than in the 1990 Census that would include vacant units." The term "household" is defined by Census Bureau to include only occupied housing units. *See* Bureau of the Census, Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8. The term "housing units", however, was defined by the Census Bureau to include both occupied and vacant units.

mits a copy of its franchise agreement which indicates that Carolina Cable is authorized to serve the unincorporated areas of Moore County, its franchise area.

4. In the absence of a demonstration to the contrary, cablesystems are presumed not to be subject to effective competition.[12] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's Rules, is present within its franchise area.[13] Carolina has met this burden. Carolina appropriately relied on data reflecting the number of households as required by our rules.[14] Relying on this data, Carolina has submitted sufficient evidence demonstrating that its cable system serving the unincorporated areas of Moore County, its franchise area, serves 438 of the 14,043 households, or 3.1 percent of the households within its franchise area. Accordingly, its petition is granted.

III. ORDERING CLAUSES

5. Accordingly, IT IS ORDERED that the petition for revocation filed by Carolina Cable Partners, challenging the certification of Moore County, North Carolina to regulate its basic cable service IS GRANTED.

6. IT IS FURTHER ORDERED that the certification granted to Moore County, North Carolina to regulate Carolina Cable Partners, basic cable rates IS RESCINDED.

7. This action is being taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[12] 47 C.F.R. § 76.906.
[13] 47 C.F.R. § 76.911(b)(1).
[14] *Third Recon Order, supra.*

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Emergency Petition for Waiver of Deadline
for Submission of Upfront Payments for
Broadband PCS Auction
filed by Personal Communications Corporation

ORDER

Adopted: January 11, 1995; Released: January 12, 1995

By the Chief, Wireless Telecommunications Bureau

1. On December 9, 1994, Personal Communications Corporation ("PCC") filed an "Emergency Petition for Waiver" of Section 1.2106 of the Commission's Rules, 47 C.F.R. §1.2106, governing the deadline for submission of upfront payments for the Broadband PCS Auction. For the reasons stated below, PCC's petition is denied.

2. PCC claims that it did not submit the required upfront payment by the November 18, 1994 deadline because its investor, United Financial Centre, Ltd. ("UFCL"), failed to transfer funds to the Commission's lock-box account in accordance with an agreement between PCC and UFCL. PCC further claims that once it realized that UFCL was not going to make the requisite payment, PCC resumed negotiations with other investors. PCC now claims to have raised the requisite funds and requests permission to submit the required upfront payment despite the fact that the deadline has passed. PCC seeks to enter the broadband PCS auction, which commenced on December 5, 1994, as a late participant.

3. PCC argues that the Commission should waive the Section 1.2106 deadline for submission of upfront payments because PCC reasonably relied on UFCL's contractual obligation to deliver the promised funds to the FCC. PCC claims that it should not be blamed or penalized for a third party's failure to perform its contractual obligations. PCC also argues that a waiver will serve the public interest because it will promote the Commission's congressionally mandated objective of enabling four of PCC's subsidiaries -- which PCC claims are designated entities -- to participate in the PCS auctions. Finally, PCC claims that it has no reasonable alternative means of participating in the PCS auctions except by waiver of Section 1.2106.

4. We deny PCC's petition because PCC has not shown that special circumstances warrant a deviation from the general rule and that such a deviation will serve the public interest. *See WAIT Radio v. F.C.C.*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), cert. denied, 409 U.S. 1027 (1972); see also Northeast Cellular Telephone Co., L.P. v. F.C.C. 897 F.2d 1164 (D.C. Cir. 1990). In general, the Commission has the authority to waive its rules if there is "good cause" to do so. 47 C.F.R. § 1.3. As part of the waiver process, however, we must identify the nature of the special circumstances that require deviation from the rule to prevent discriminatory applications and to put future parties on notice. *Northeast Cellular v. F.C.C.*, 897 F.2d at 1166. We are not persuaded that a third party's failure to perform a contractual obligation constitutes a "special circumstance." Conceivably, many applicants failed to secure financing by the November 18, 1994 deadline and thus were unable to participate in the Broadband PCS Auction. Moreover, PCC had the option of securing back-up financing as an added precaution, or requiring UFCL to transfer the funds far enough in advance of the upfront payment deadline to deal with the possibility that UFCL would fail to perform.

5. Finally, we disagree with PCC that the public interest is served by allowing its subsidiaries to participate in the auction at this late date. As required by Congress, we have made provisions to ensure that designated entities are given an opportunity to participate in PCS auctions. *See Fifth Report and Order* in PP Docket 93-253, FCC 94-178 (released July 15, 1994); *see also Fifth Memorandum Opinion and Order* in PP Docket 93-253, FCC 94-285 (released November 23, 1994). We thus have no obligation to waive our rules because of PCC's subsidiaries' alleged designated entity status. To the contrary, grant of PCC's waiver request would harm the public interest because it could result in substantial injury to other applicants who have based their bidding strategy on the current universe of eligible bidders. Opening up markets to a new applicant at this juncture would cause significant prejudice to these bidders. Likewise, granting such a waiver would be unfair to parties who decided not to participate in the auction because of an inability to secure financing by the November 18, 19984 deadline. Had these potential applicants thought our deadlines were flexible, they may have continued to seek investors beyond the cut-off date.[1] Grant of PCC's waiver would harm the public interest by undermining the fairness and integrity of the auction process. Thus, although we recognize that PCC may not have an alternative means of participating in the Broadband PCS Auction, harm to the public interest outweighs any benefits that may be derived from granting a waiver to PCC of Section 1.2106.

6 . Accordingly, IT IS ORDERED that the Emergency Petition for Waiver filed by PCC on December 9, 1994, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Regina M. Keeney
Chief, Wireless Telecommunications Bureau

[1] *See Order*, DA 94-1580 (released Dec. 23, 1994) (denying Data Link's Emergency Petition and Request for Stay of the PCS Auction).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PALMETTO CABLE TV

Petition for Reconsideration
of the Certification of
Lancaster County, South Carolina
to Regulate Basic Cable Service Rates
(SC0448)

MEMORANDUM OPINION AND ORDER

Adopted: December 23, 1994; Released: December 23, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On March 21, 1994, Palmetto Cable TV ("Palmetto") filed a timely petition for reconsideration challenging the certification of Lancaster County ("The County" or "Lancaster") to regulate rates for basic cable service and associated equipment.[1] In addition, Palmetto filed a supplement to its original petition containing supporting documentation pursuant to a recent Commission Order.[2] Lancaster County did not file an opposition to Palmetto's petition. On December 20, 1994, Palmetto filed a response to the Bureau's December 19, 1994 request for clarifying information.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators that are not subject to effective competition.[3] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition, unless they have actual knowledge to the contrary.[4] Certification becomes effective 30 days from the date of filing unless the Commission finds that the franchising authority does not meet the statutory certification requirements.[5] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days from the date such certification becomes effective.[6] Rate regulation is automatically stayed pending review of a timely-filed petition for reconsideration alleging the presence of effective competition.[7]

II. DISCUSSION

3. Palmetto argues that its cable system is subject to effective competition because it serves fewer than 30 per cent of the households in the unincorporated areas of Lancaster County, its franchise area.[8] Palmetto claims that it serves only 563 of the 12,172 households (that is, occupied housing units)[9] in the unincorporated areas of Lancaster County, or 4.6 per cent of the total number of households. As supporting documentation, Palmetto provides a copy of the relevant page of the 1990 Census data which shows that there are 19,778 households in Lancaster County. In addition, Palmetto provides 1990 Census data[10] illustrating that there are 7,606 households located in the incorporated areas of Lancaster County. Palmetto states that it subtracted the 7,606 households in the incorporated areas of the County from the 19,778 households located in the entire County, to arrive at the 12,172 households in the unincorporated areas of Lancaster County. Palmetto also submits a computer print-out with sufficient subscriber information to support its claim that it serves 563 subscribers in its franchise area.

4. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective

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[1] Lancaster filed a Certification of Franchising Authority to Regulate Basic Cable Rates and Initial Finding of Lack of Effective Competition (FCC Form 328) with the Commission on January 21, 1994. Certification became effective on February 20, 1994.

[2] *Cable Operators' Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates*,9 FCC Rcd 3656 (1994) ("Effective Competition Order").

[3] Communications Act of 1934 §623(a)(4), 47 U.S.C. § 543(a)(4).

[4] 47 C.F.R. § § 76.906, 76.910(b)(4).

[5] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt or administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, or the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition. 47 C.F.R. § 76.910(b). *See also* 47 U.S.C. § 543(a)(4).

[6] 47 C.F.R. § § 1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[7] 47 C.F.R. § 76.911(c).

[8] The 1992 Cable Act (Communications Act of 1934, § 623(a)(2), 47 U.S.C. § 543(a)(2)) and the Commission's rules (47 C.F.R. § 76.905(a)) provide that only the rates of cable systems that are not subject to effective competition may be regulated. One of the bases by which a cable system will be deemed subject to effective competition is if fewer than 30 per cent of the households in the system's franchise area subscribe to the system's cable service. Communications Act of 1934, § 623(l)(1)(A), 47 U.S.C. § 543(l)(1)(A); 47 C.F.R § 76.905(b)(1).

[9] As the Commission stated recently, "we presume that Congress did not intend "households" to have a different meaning than in the 1990 Census that would include vacant units." *Third Order on Reconsideration*, MM Dockets Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) ("*Third Recon. Order*"). The count of "households" in the 1990 Census reflects only occupied housing units. See Bureau of the Census, 1990 Census of Population and Housing, Summary Population and Housing Characteristics. South Carolina, 1990 CPH1-42 Table 5, at 41.

[10] As the Bureau has stated recently, the 1990 Census data is an appropriate source for household data. *Effective Competition Order, supra*.

competition.[11] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's rules, is present within the franchise area.[12] Palmetto has met this burden. Palmetto appropriately relied on data reflecting the number of households as required by our rules.[13] Relying on this data, Palmetto has submitted sufficient evidence demonstrating that its cable system serving the unincorporated areas of Lancaster County, its franchise area, serves 563 of the 12,172 households, or 4.6 per cent of the households within its franchise area. Thus, we find that Palmetto's system serving the unincorporated areas of Lancaster County is subject to effective competition. Accordingly, the petition is granted.

III. ORDERING CLAUSES

5. Accordingly, IT IS ORDERED that the petition for reconsideration filed by Palmetto Cable TV challenging the certification of Lancaster County to regulate Palmetto's basic cable service rates IS GRANTED.

6. IT IS FURTHER ORDERED that the certification of Lancaster County to regulate Palmetto Cable TV's basic cable service rates IS RESCINDED.

7. This action is taken pursuant to delegated authority pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[11] 47 C.F.R. § 76.906
[12] 47 C.F.R. § 76.911(b)(1).
[13] *Third Recon. Order, supra.*

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

JAMES CABLE PARTNERS, L.P.,
D/B/A CABLE FLORIDA

Petition for Reconsideration
of the Certification of
Alachua County, FL
to Regulate Basic Cable Service Rates
(FL0367)

MEMORANDUM OPINION AND ORDER

Adopted: December 23, 1994; Released: December 23, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On December 17, 1993, James Cable Partners, L.P., d/b/a Cable Florida ("Cable Florida") filed a timely petition for reconsideration, challenging the certification of the Board of County Commissioners, Alachua County, Florida ("the County") to regulate Cable Florida's basic cable service and associated equipment rates.[1] The County filed an opposition to which Cable Florida then filed a reply.[2]

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate the basic cable service rates of cable operators that are not subject to effective competition.[3] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within its jurisdiction are not subject to effective competition, unless they have actual knowledge to the contrary.[4] Certification becomes effective 30 days from the date of filing unless the Commission finds that the franchising authority does not meet the statutory certification requirements.[5] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days from the date such certification becomes effective.[6] Rate regulation is automatically stayed pending review of a timely-filed petition for reconsideration alleging effective competition.[7]

II. DISCUSSION

3. Cable Florida asserts that its system is subject to effective competition because it serves fewer than 30 percent of the households in its franchise area, which is comprised of various unincorporated portions[8] of Alachua County.[9] Specifically, Cable Florida contends that it serves 151 of the more than 682 households (*i.e.*, occupied housing units)[10] in its franchise area or approximately 22 percent of the total number of households. Cable Florida claims to have derived its household data by actually counting the number of households in its franchise area. In a declaration made by a Cable Florida official attached to its reply brief, Cable Florida explained the method it used in deriving its household data. This declaration made clear that only occupied housing units were counted. Cable Florida did not rely on Census data but rather, actually counted occupied housing units its system passed. Cable Florida did not count all the households it passed; but rather ceased to count the number of households passed when the total was high enough to demonstrate that it met the effective competition test. Cable Florida notes that there are more households in its franchise area, but concluded that additional counting was not necessary to satisfy the 30 percent penetration test. Cable Florida claims to have de-

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[1] Alachua County filed its "Certification of Franchising Authority to Regulate Basic Cable Services Rates and Initial Finding of Lack of Effective Competition" ("FCC Form 328") on October 19, 1993. Its certification became effective on November 18, 1993.

[2] As Cable Florida notes in its "Reply to Opposition to Petition for Reconsideration," the County's opposition is untimely. However, we will address the County's arguments in this order because we wish to base our decision on a complete record, even though the County's arguments do not change the outcome of our decision.

[3] Communications Act § 623 (a)(4); 47 U.S.C. § 543(a)(4).

[4] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[5] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt and the personnel to administer, rate regulation; (3) procedural laws and regulations, applicable to rate regulation proceedings by the franchising authority, do not provide a reasonable opportunity for the consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition. 47 C.F.R. § 76.910(b). *See also* Communications Act § 623(a)(4); 47 U.S.C. § 543(a)(4).

[6] 47 C.F.R. §§ 1.106, 76.911. *Report and Order and Further Notice of Proposed Rulemaking*in MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993) (*"Rate Order"*).

[7] 47 C.F.R. § 76.911(c)(1).

[8] Cable Florida has a franchise to serve the unincorporated portions of Alachua County adjacent to the incorporated areas of Micanopy, Alachua, High Springs and Hawthorne.

[9] The 1992 Cable Act (Communications Act of 1934 § 623(a)(2); 47 U.S.C. § 543(a)(2)) and the Commission's Rules (47 C.F.R. § 76.905(a)) provide that only the rates of cable systems that are not subject to effective competition may be regulated. One of the bases by which a cable system will be deemed subject to effective competition is if the system in question serves fewer than 30 percent of the households in the franchise area. Communications Act of 1934 § 623(l)(1)(A); 47 U.S.C. § 543(l)(1)(A); 47 C.F.R. § 76.905(b)(1).

[10] *See Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (*"Third Recon. Order"*). As the Commission stated in the *Third Recon. Order*, "[a]s used in the Cable Act, we presume that Congress did not intend households' to have a different meaning than in the 1990 Census that would include vacant units or even partial year vacant units." *Third Recon. Order, supra*. The term "household" is defined for purposes of the 1990 Census data as "all the persons who occupy a housing unit." Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8. Thus, the term "households" reflects only occupied housing units.

termined its subscriber data by counting each separately billed or billable subscriber. Finally, Cable Florida provides a declaration under penalty of perjury by a responsible official certifying to the accuracy of the data included in the petition.

4. In response, the County argues that Cable Florida cannot be subject to effective competition in the unincorporated portions of Alachua County because no other cable operator serves those portions. Also, the County challenges the validity of Cable Florida's subscriber data, noting that according to information previously provided by Cable Florida to the County, Cable Florida served only 63 subscribers on December 31, 1990, 72 subscribers on December 31, 1991, and 74 subscribers on November 20, 1992. The County asserts that, in this proceeding, Cable Florida has presented new and substantially higher subscriber numbers. Because they have not been sufficiently explained in relation to its previously supplied subscriber numbers, the County claims that these numbers are suspect. The County further asserts that Cable Florida has inappropriately counted households located in a portion of territory that is actually part of the incorporated municipalities of Alachua and High Springs, rendering Cable Florida's household count inaccurate.

5. In its reply, Cable Florida disputes the County's claim that it has inappropriately counted households that are outside of its franchise area. Cable Florida offers declarations by city officials from the incorporated municipalities of Alachua, High Springs, and Hawthorne, each supporting the proposition that the households included by Cable Florida in its household count, are not located within their respective jurisdictions. Cable Florida also explains that the previous subscriber figures that it had provided to the County were based on records that inadvertently misidentified some of its subscribers as residing in the incorporated municipalities rather than correctly including them in the unincorporated portions of its Alachua County franchise area. Cable Florida claims to have established its subscriber count for this proceeding by visually inspecting and counting all cable drops within its franchise area.

6. As a preliminary matter, we find no merit to the County's contention that Cable Florida is not subject to effective competition because there is no other cable operator offering video programming in the franchise area. As noted previously, a cable system is subject to effective competition if the system in question serves fewer than 30 percent of the households in the franchise area.[11] For purposes of this test, the presence or absence of another cable system is not relevant.[12] We also find that the evidence does not support the County's conclusion that Cable Florida counted households that are actually located in incorporated areas of Alachua County, outside of Cable Florida's franchise area. Finally, we find that the County's challenge to Cable Florida's subscriber count lacks merit. To accept the County's subscriber count as more accurate would only lower Cable Florida's penetration level. Instead we will rely on Cable Florida's most recent subscriber count in rendering this decision.[13] Also, although we would normally require that an operator provide a number that represents all of the households in the franchise area, we will accept Cable Florida's household count in recognition of the fact that a fully accurate count of the households in its franchise area is not readily available from official sources and that such a complete count would only lower Cable Florida's penetration level.[14]

7. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[15] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by § 76.905 of the Commission's rules, is present within its franchise area.[16] Cable Florida has met this burden. Cable Florida has demonstrated that it offers service to no fewer than 682 households within its franchise area. This data is appropriately based on households (*i.e.*, occupied housing units) within the franchise area. Relying on this data, Cable Florida has demonstrated that its system serves 151 subscribers out of no fewer than 682 households, or at most 22 percent of the households in the franchise area. Thus, we find that Cable Florida's system serving Alachua County is subject to effective competition. Accordingly, its petition is granted.

III. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED that the petition for reconsideration, filed by James Cable Partners, L.P., d/b/a Cable Florida, challenging the certification of Alachua County, 8Florida, Board of County Commissioners to regulate rates, IS GRANTED.

9. IT IS FURTHER ORDERED that the Certification of Alachua to regulate the basic cable service rates of James Cable Partners,

10. This action is taken pursuant to delegated authority under § 0.321 of the Commission's rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[11] *Seen.8 supra.*

[12] *Rate Order* at 5643; *Cf* 47 C.F.R. § 76.905(b)(2).

[13] In its original petition for reconsideration, Cable Florida claimed that it served 182 subscribers in its Alachua franchise area. In its reply to the County's opposition to its petition for reconsideration, Cable Florida provided a new figure of 151 subscribers, noting in its supporting declaration that it had recounted both the number of households served and the number of households passed in response to the County's opposition.

[14] Because Cable Florida is authorized to serve certain unincorporated portions of Alachua County, Census data for its particular franchise area is not readily available.

[15] 47 C.F.R. § 76.906.

[16] 47 C.F.R. § 76.911(b)(1).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

DOUGLAS CABLE COMMUNICATIONS, LIMITED PARTNERSHIP

Petition for Reconsideration
of the Certification of
Topeka, Kansas,
to Regulate Basic Cable Service
Rates (KS0564)

By the Chief, Cable Services Bureau:

MEMORANDUM OPINION AND ORDER

Adopted: January 13, 1995; Released: January 17, 1995

1. On November 5, 1993, Douglas Cable Communications, Limited Partnership, ("Douglas") submitted a timely petition for reconsideration challenging the certification of the City of Topeka, Kansas ("the City") to regulate the system's rates for basic cable service and associated equipment.[1] The City filed a response to Douglas' petition stating that it did not oppose Douglas' petition.

2. Section 623(a)(4) of the Communications Act, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators that are not subject to effective competition.[2] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition unless the franchising authority has actual knowledge to the contrary.[3] Certification becomes effective 30 days from the date of filing unless the Commission finds that the authority does not meet the statutory certification requirements.[4] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days of the effective date of such certification.[5] Rate regulation is automatically stayed pending review of a timely-filed petition for reconsideration alleging the presence of effective competition.[6]

3. Douglas argues that its cable system is subject to effective competition because its system meets the "low penetration" effective competition test specified in Section 623 (l)(1)(A) of the Communications Act.[7] After considering Douglas' petition and in response to a letter dated December 27, 1994 from the Commission, the City submitted letters dated January 5, 1995 and January 6, 1995 requesting withdrawal of its certification. In its January 5, 1995 letter, the City agreed that the "interest of Douglas Cable subscribers are protected by the presence of 'effective competition.'" In its January 6, 1995 letter, the City states that "neither the City of Topeka nor any of its officials or employees have received consideration in exchange for withdrawal of the City of Topeka's certification to regulate Douglas Cable's rates."

4. In light of the above filings by the City of Topeka, we will grant Douglas' petition for reconsideration.

ORDERING CLAUSES

5. Accordingly, IT IS ORDERED that the petition for reconsideration filed by Douglas Cable Communications, Limited Partnership, challenging the certification of the City of Topeka, Kansas, to regulate its basic cable service rates IS GRANTED.

6. IT IS FURTHER ORDERED that the certification granted to the City of Topeka, Kansas, to regulate Douglas Cable Communications, Limited Partnership's basic cable rates IS RESCINDED.

7. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, as amended, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[1] The City filed its Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Effective Competition ("FCC Form 328") on September 13, 1993. Its certification became effective on October 13, 1993.

[2] Communications Act of 1934 § 623 (a)(4), 47 U.S.C. § 543(a)(4).

[3] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[4] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, and the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition. 47 C.F.R. § 76.910(b). *See also* 47 U.S.C. § 543(a)(4).

[5] 47 C.F.R. §§ 1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[6] 47 C.F.R. § 76.911(c).

[7] The Cable Act (Communications Act of 1934 § 623 (a)(2), 47 U.S.C. § 543 (a)(2)) and the Commission's rules (47 C.F.R. § 76.905 (a)) provide that only the rates of cable systems that are not subject to effective competition may be regulated. One of the bases on which a cable system is deemed subject to effective competition is if fewer than 30 percent of the households in the system's franchise area subscribe to the cable service of the system. Communications Act of 1934, § 623 (l)(1)(A), 47 U.S.C. § 543 (l)(1)(A); 47 C.F.R. § 76.905 (b)(1).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Rosa Candelaria,
Complainant,

v. File No. E-94-66

AT&T Communications,
Defendant.

ORDER

Adopted: February 15, 1995; Released: February 22, 1995

By the Chief, Formal Complaints & Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On May 13, 1994, Rosa Candelaria (Candelaria) filed the above-captioned complaint against AT&T Communications (AT&T) alleging, among other things, that AT&T violated the Communications Act by seeking to collect from Candelaria payment of charges associated with disputed third party calls. On January 9, 1995, however, Candelaria and AT&T file a joint motion to dismiss the complaint with prejudice. In support of the motion, the parties state that a mutually agreeable settlement has been reached.

2. We are satisfied that the parties' joint motion to dismiss will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources by the parties and by the Commission.

3. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 4(j), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), and 208, and the authority delegated in Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the parties' Joint Motion to Dismiss IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE, and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

SPRINT COMMUNICATIONS COMPANY L.P. File No. I-T-C-95-039

Application for authority to acquire and operate facilities for service between the United States and Jordan and Ghana.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: February 1, 1995; Released: February 22, 1995

By the Chief, Telecommunications Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the United States on the one hand, and Jordan and Ghana, on the other hand, by Sprint Communications Company L.P. (Sprint).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-95-039 IS GRANTED and Sprint is authorized to:

a. lease from Comsat and operate one 2.048 Mbps satellite circuit between the Shenandoah, Virginia earth station and an appropriate INTELSAT satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and an earth station in Jordan, furnished by Sprint's correspondent;

b. lease and operate facilities in the Shenandoah earth station to be used in conjunction with the satellite space segment capacity;

c. own and operate connecting facilities between the Shenandoah earth station and Sprint's New York operating center;

d. use the facilities in a, b, and c, above, to provide Sprint's regularly authorized services between the United States and Jordan;

e. lease from Comsat and operate one 1.024 Mbps satellite circuit between the Shenandoah, Virginia earth station and an appropriate INTELSAT satellite over the Atlantic Ocean, connecting with a similar circuit between the satellite and an earth station in Ghana, furnished by Sprint's correspondent;

f. lease and operate facilities in the Shenandoah earth station, to be used in conjunction with the space segment capacity;

g. own and operate connecting facilities between the Shenandoah earth station and Sprint's New York operating center; and

h. use the facilities in e, f, and g, above, to provide Sprint's regularly authorized services between the United States and Ghana.

3. IT IS FURTHER ORDERED that our authorization of Sprint to provide private lines as part of its authorized services is limited to the provision of such private lines only between the United States and Jordan or Ghana -- that is, private lines which originate in the United States and terminate in Jordan or Ghana or which originate in Jordan or Ghana and terminate in the United States. In addition, Sprint may not -- and Sprint's tariff must state that its customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or Jordan or Ghana end, or both, for the provision of international basic switched services, unless authorized to do so by the Commission upon a finding that Jordan or Ghana affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991), Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1992), *petition for reconsideration pending*.

4. IT IS FURTHER ORDERED that neither Sprint nor any persons or companies directly or indirectly controlling or controlled by Sprint, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which Sprint or any persons or companies controlling or controlled by Sprint are parties.

5. IT IS FURTHER ORDERED that the applicant shall file copies of any operating agreement it enters into with its foreign correspondent with the Commission within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

8. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.15(b) of the Commission's Rules, 47 C.F.R. §63.15(b), for the common carrier facilities authorized herein.

9. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

10. This order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applica-

tions for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell, Chief
Telecommunications Division
International Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

BLUE RIDGE CABLE
TELEVISION, INC.

Petition for Reconsideration
of the Certification of
Tunkhannock Township,
Pennsylvania to Regulate
Basic Cable Service Rates
(PA1353)

MEMORANDUM OPINION AND ORDER

Adopted: January 20, 1995; Released: January 23, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On February 3, 1994, Blue Ridge Cable Television, Inc. ("Blue Ridge") filed a timely Petition for Reconsideration challenging the certification of the Township of Tunkhannock, Pennsylvania (the "Township" or "Tunkhannock") to regulate rates for basic cable service and associated equipment.[1] The Township filed a Motion in Opposition to Blue Ridge's Petition. On August 19, 1994, Blue Ridge submitted its supplemental pleading in response to the Commission's July 29, 1994 Order.[2] Pursuant to Commission requests, Blue Ridge filed clarifying information on August 26, 1994 and December 23, 1994, and Tunkhannock filed clarifying information on January 3, 1995.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators that are not subject to effective competition.[3] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition, unless they have actual knowledge to the contrary.[4] Certification becomes effective 30 days from the date of filing unless the Commission finds that the franchising authority does not meet the statutory certification requirements.[5] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days from the date such certification becomes effective.[6] Rate regulation is automatically stayed pending review of a timely-filed petition for reconsideration alleging the presence of effective competition.[7]

II. DISCUSSION

Petitioner's Contentions

3. Blue Ridge bases its challenge on the competing provider test for effective competition.[8] Blue Ridge argues that its system serving the Township is subject to effective competition because its franchise area is: 1) served by itself and Pocono CATV, Inc. ("Pocono"), an unaffiliated multichannel video programming distributor ("MVPD"), each of which offers comparable programming to at least 50 percent of the households in the franchise area; and 2) the number of households subscribing to Pocono, the smaller operator, exceeds 15 percent of the households in the franchise area.

4. Blue Ridge states that there are 2,196 "homes" in Tunkhannock Township, the franchise area. Blue Ridge states that its cable system passes 407 of the 2,196 "homes", or 18.5 percent of the total number of "homes". In addition, Blue Ridge states that it serves 258 of the 2,196 "homes" or 12 percent of the total number of "homes."[9]

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[1] The Township filed its "Certification of Franchising Authority to Regulate Basic Cable Service rates and Initial Finding of Lack of Effective Competition" on January 18, 1994, which became effective on February 17, 1994.

[2] *Cable Operator's Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates*, 9 FCC Rcd 3656 (1994) (*"Effective Competition Order"*).

[3] Communications Act of 1934 §623(a)(4), 47 U.S.C. §543(a)(4).

[4] 47 C.F.R. §§76.906, 76.910(b)(4).

[5] 47 C.F.R. §76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, or personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition. 47 C.F.R. §76.910(b). *See also* Communications Act of 1934 §623(a)(4), 47 U.S.C. §543(a)(4).

[6] 47 C.F.R. §§1.106, 76.911. *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993) (*"Rate Order"*).

[7] 47 C.F.R. §76.911(c).

[8] The 1992 Cable Act and the Commission's rules provide that only the rates of cable systems that are not subject to effective competition may be regulated. Communications Act of 1934 §623(a)(2), 47 U.S.C. §543(a)(2); 47 C.F.R. §76.905(a). One of the bases on which a cable system is deemed subject to effective competition is if the franchise area is: 1) served by at least two unaffiliated multichannel video programming distributors each of which offers comparable programming to at least 50 percent of the households in the franchise area; and 2) the number of households subscribing to multichannel video programming other than the largest multichannel video programming distributor exceeds 15 percent of the households in the franchise area. Communications Act of 1934 §623(l)(1)(B), 47 U.S.C. §543(l)(1)(B); 47 C.F.R. §76.905(b)(2).

[9] In its Petition, Blue Ridge asserted that it serves 259 subscribers. However, as part of its December 23, 1994 submission to the Commission, Blue Ridge clarified that one of those 259 subscribers was a seasonal subscriber and, therefore, inappropriately included in Blue Ridge's subscriber total.

Blue Ridge submits 1990 Census information[10] applicable to the Township which indicates that there are 2,196 total housing units and 719 households in Tunkhannock Township.[11] In addition, Blue Ridge submits a letter addressed to Pocono stating that Blue Ridge passes 407 homes in the franchise area. Blue Ridge further submits a copy of a computer print-out with sufficient information to demonstrate that it serves 258 subscribers. Blue Ridge also submits a copy of its FCC Form 320 to demonstrate that it serves the Township. Finally, Blue Ridge submits a copy of its channel guide which demonstrates that it provides 56 channels of programming, including at least 39 non-broadcast channels.[12]

5. With respect to Pocono, Blue Ridge states that Pocono passes 550 of the 2,196 "homes" or 25 percent of the total number of "homes" in the franchise area. In addition, it states that Pocono serves 224 of the 2,196 "homes," or 10 percent of the total number of "homes." As support, Blue Ridge submits a letter from Pocono, in which Pocono states that its cable system in Tunkhannock passes 550 and serves 224 of the 2,196 "homes."[13] Blue Ridge also submits a copy of an advertisement run by Pocono in a local newspaper, and a page from the Television and Cable Factbook demonstrating that Pocono serves the Township.[14] In addition, Blue Ridge submits a copy of Pocono's channel line-up, which demonstrates that Pocono offers 44 channels of video programming, including at least 30 non-broadcast channels.[15]

6. The Township filed an opposition to Blue Ridge's Petition which asserted that: "Tunkhannock Township is served exclusively by Blue Ridge Cable Television, Inc. and there are no [un]affiliated multi-channel video program distributors in the context of Section 76.905."[16] On January 3, 1995, however, pursuant to the Commission's request for clarification, the Township, through its solicitor, clarified that Blue Ridge and Pocono each operate cable systems in different parts of the Tunkhannock Township franchise area.[17]

7. The Commission contacted Blue Ridge requesting that Blue Ridge clarify whether the homes passed figures submitted by Blue Ridge represent the number of housing units (*i.e.*, occupied and unoccupied housing units) passed, or whether the figures submitted represent households (*i.e.*, occupied, non-seasonal housing units) passed as required by the Commission's rules. In response, Blue Ridge stated that ". . . the number [of homes passed] compiled by our engineering department, represents the actual number of occupied households whom are potential subscribers and our cable must physically pass in front of a potential subscriber's home. As our engineers physically plan the cable extension, they count and solicit homeowners to find out who may be interested in cable service."[18] Blue Ridge also clarified that "[t]he homes passed number does not include homes which we know to be used as seasonal residences. If it is obvious that the structure is a seasonal residence it is not counted."[19] The Commission also requested that Blue Ridge clarify whether the figures regarding "homes passed" by Pocono represent the number of housing units (*i.e.*, occupied and unoccupied housing units) passed, or whether the figures submitted represented households (*i.e.*, occupied, non-seasonal housing units) passed as required by the Commission's rules. In response, Blue Ridge stated that "Blue Ridge Cable and Pocono CATV engineers probably determine homes passed in a similar manner."[20]

8. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[21] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's rules, is present within its franchise area.[22] Based on the totality of the evidence presented, we find that Blue Ridge has not met this burden. However, as discussed below, if Blue Ridge can provide us with certain additional evidence as to the homes passed by Pocono in the franchise area, we would entertain a new petition.

9. The first prong of the competing provider test for effective competition requires that the franchise area be served by at least two unaffiliated MVPDs, each of which offers comparable programming to at least 50 percent of the households in the franchise area.[23]

10. With regard to the issue of programming comparability, we find that Blue Ridge has submitted sufficient evidence that the programming of the two operators are comparable. The channel lineups for both operators submitted by Blue Ridge establish that each operator offers over 44 channels with more than 30 non-broadcast channels -- this satisfies the Commission's programming comparability criteria.[24]

11. The 1990 Census data submitted by Blue Ridge shows that there are 2,196 total housing units (*i.e.*, occupied and unoccupied housing units), including 719 households (*i.e.*, occupied housing units) in the franchise area. Thus, in

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[10] As the Commission stated in the *Effective Competition Order*, the 1990 Census is an appropriate source for household data. *Effective Competition Order, supra.*

[11] "Housing units" are not the same as "households," the term used in the Cable Act and the Commission's rules. The count of "households" in the 1990 Census reflects only occupied housing units. *See* Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8. "Housing units" reflect occupied and unoccupied units.

[12] Competing MVPDs must offer comparable video programming to households in the franchise area. *See* 47 C.F.R. §76.905(b)(2). As the Commission has stated previously, in order to provide "comparable" video programming, a MVPD must provide at least 12 channels of video programming, including at least one non-broadcast channel. *See Rate Order*, at 5667.

[13] Section 76.911(b)(2) of the Commission's regulations authorizes a cable operator to request from a competitor information regarding the competitor's reach and subscribership, and requires the competitor to respond. The response, however, may be limited to simply a statement of numerical totals. *See* 47 C.F.R. §76.911(b)(2).

[14] *See* 1994 Television and Cable Factbook at D-1469.

[15] Blue Ridge also submits an advertisement from a local newspaper for Pocono's service.

[16] Tunkhannock Opposition at 1.

[17] Tunkhannock January 3, 1995 Filing at 1.

[18] Blue Ridge August 26, 1994 Filing at 1.

[19] Blue Ridge December 23, 1994 Filing at 1.

[20] Blue Ridge December 23, 1994 Filing at 1.

[21] 47 C.F.R. §76.906.

[22] 47 C.F.R. §76.911(b)(1).

[23] 47 C.F.R. §76.905(b)(2)(i).

[24] *See* n.12, *supra.*

making its calculations, Blue Ridge used total housing units, not households. Yet our rules require the number of households to be the reference point for purposes of gauging effective competition under this test, just as it is required under the low penetration test.[25] While the total number of households in the franchise area (in this case 719) may be obtained from the Census data, we recognize that determining the number of households which are actually passed by a cable operator, as opposed to the number which exist in the franchise area, may not be easily accomplished. Such information is not provided by the Census data, and we understand that such information may not generally be readily available to, or easily collected by, operators. However, because we are concerned to identify franchise areas which are subject to effective competition, we will examine the totality of the evidence submitted by Blue Ridge to see if conclusions can be drawn from it about the percentage of households passed by Blue Ridge and Pocono.

12. The Commission contacted Blue Ridge requesting that it clarify whether the homes passed figures submitted by Blue Ridge represent the number of housing units (*i.e.*, occupied and unoccupied housing units) passed, or whether the figures submitted represent households (*i.e.*, occupied, non-seasonal housing units) passed as required by the Commission's rules. Blue Ridge's clarifying information is sufficient to show that Blue Ridge passes at least 50 percent of the households in Tunkhannock. Blue Ridge's description of how its engineers calculate the number of households passed clarified that only households (*i.e.*, occupied, non-seasonal housing units) were counted. The Census data submitted by Blue Ridge establishes that there are 719 households in Tunkhannock Township. Blue Ridge also established that its system passes 407 of the 719 households, or 56.6 percent of the total number of households. Therefore, the Commission finds that Blue Ridge offers service to at least 50 percent of the households in its franchise area.

13. With regard to Pocono, Blue Ridge submitted a letter from Pocono asserting that "[t]here are 550 homes passed in Tunkhannock Township."[26] Blue Ridge's statement that Blue Ridge and Pocono probably calculate the number of households passed in the same manner is not sufficient evidence for the Commission to conclude that Pocono offers service to at least 50 percent of the households in the franchise area. Our regulations require that a cable operator bear the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition exists in its franchise area.[27] Part of this burden is convincing the Commission that the methods used by the cable operator in gathering statistics which demonstrate effective competition were conducted in the proper way. Blue Ridge has failed to so convince the Commission with regard to the number of households passed by Pocono.

14. In a previous case involving Blue Ridge's claim of effective competition in the Township of Heidelberg, Pennsylvania, an unrelated franchise area, the Commission made certain calculations based on the evidence presented to determine whether a cable operator offers service to at least 50 percent of the households in its franchise area.[28] The first calculation determines whether a cable operator actually provides service to at least 50 percent of the households in its franchise area, since by definition that cable operator must also offer service to over 50 percent of the households in its franchise area. Applying these calculations to the information submitted for Pocono, we note that the 1990 Census data submitted by Blue Ridge indicates that there are 719 households in the franchise area. Blue Ridge asserts that Pocono actually serves 224 subscribers in the franchise area, which is 31.2 percent of the total households in the franchise area. Unlike the *Heidelberg* case, we cannot use this calculation to conclude that Pocono clearly passes more than 50 percent of the households in the franchise area. The second calculation used in the *Heidelberg* case uses Census data and reduces the number of housing units passed by a cable operator's system by the franchise area's vacant housing units to arrive at an approximate number of households passed by the cable operator. Here, if we subtract the total number of households (719) from the total number of housing units (2,196), we find that in the franchise area 1,477 housing units, or approximately 67.3 percent of total housing units, were unoccupied. If we apply this same ratio to the number of "homes" Blue Ridge claims are passed by Pocono (550), we arrive at a rough household number of 180. This number is about 25 percent of the total households in the area.[29] Under either calculation, the evidence does not permit us to conclude that Pocono passes more than 50 percent of the households in the franchise area.

15. The Commission also notes that the households passed figures submitted by Blue Ridge for itself and Pocono involve a discrepancy. According to Blue Ridge, it passes 407 households in the Township while Pocono allegedly passes 550, for a total of 957 households passed in a franchise area of 719 households, as defined by the Census. Ordinarily, the Commission would attribute this discrepancy to overbuilt sections of the Township. However, Tunkhannock stated to the Commission that Blue Ridge and Pocono operate their systems in separate, noncontiguous areas of Tunkhannock Township. Because the Commission has already concluded that Blue Ridge has submitted insufficient evidence to support its effective competition claim, we need not make any further inquiry into, or determination of, these claims at this time.

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[25] *See* Communications Act of 1934 §623 (l)(1)(A), 47 U.S.C. §543(l)(1)(A); 47 C.F.R. §76.905(b)(1) (measuring low penetration effective competition by percentage of households subscribing to cable in the franchise area); Communications Act of 1934 §623(l)(1)(B), 47 U.S.C. §543(l)(1)(B); 47 C.F.R. §76.905(b)(2) (measuring direct effective competition by percentage of households passed and percentage of households subscribing to cable in the franchise area).

[26] *See* Blue Ridge Supplement, Document 1 at 2.

[27] 47 C.F.R. §76.911(b)(1).

[28] *Blue Ridge Cable Television, Inc., Petition for Reconsideration of Certification of the Township of Heidelberg, Pennsylvania to Regulate Basic Cable Service Rates* (FCC Community ID No. PA0742), DA 94-1525, (released: December 20, 1994).

[29] Because 25 percent is far below the 50 percent threshold, the Commission need not perform the worst case scenario in which we assume that Pocono passes all of the unoccupied housing units in the franchise area.

16. With regard to the second prong of the competing provider effective competition test, we find that because Blue Ridge has not submitted sufficient evidence demonstrating that Pocono passes at least 50 percent of the households in the franchise area, we cannot conclude that Pocono meets the second prong of the competing provider test. As the Commission stated in its *Rate Order*, only those cable systems that offer programming to at least 50 percent of the households in the franchise area may be considered for purposes of the cumulative subscribership prong of the test.[30] Here, Blue Ridge has submitted evidence which suggests that Pocono may be the smaller provider and that it serves 224 subscribers out of the 719 households , or 31.2 percent of total households. However, as Blue Ridge has not established that Pocono meets the first prong of the competing provider test, the Commission cannot conclude that it has met the second prong of the test.

17. As Blue Ridge has failed to satisfy the competing provider effective competition test, its Petition is denied. However, if Blue Ridge can demonstrate to the Commission with sufficient evidence that the number of "homes" passed by Pocono in the franchise area is indeed the number of "households" (*i.e.*, occupied, non-seasonal housing units) passed, and clarify the "homes passed" discrepancy discussed by the Commission in paragraph 15, the Commission would entertain a new petition. Such a petition should be brought as a petition for revocation pursuant to Section 76.914 of our rules.[31]

III. ORDERING CLAUSES

18. Accordingly, IT IS ORDERED that the Petition for Reconsideration filed by Blue Ridge Cable Television, Inc. challenging the Certification of the Township of Tunkhannock, Pennsylvania IS DENIED.

19. IT IS FURTHER ORDERED that the automatic stay imposed by Section 76.911(c) of the Commission's rules, as amended, IS TERMINATED.[32]

20. IT IS FURTHER ORDERED that Blue Ridge Cable Television, Inc. SHALL FILE the required rate justifications on the applicable forms with the Township of Tunkhannock, Pennsylvania within thirty days of the release date of this *Memorandum Opinion and Order* or within thirty days of receipt of notice from the Township of Tunkhannock, Pennsylvania that it is regulating Blue Ridge's rates, whichever is later.

21. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules.[33]

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[30] *Rate Order* at 5664-65.
[31] 47 C.F.R. §76.914.
[32] 47 C.F.R. §76.911(c).
[33] 47 C.F.R. §0.321.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

INSIGHT COMMUNICATIONS COMPANY
OF NEW YORK, INC.

Petition for Reconsideration
of the Certification of
Hamilton County, Indiana,
to Regulate Basic Cable Service Rates
(IN0205)

MEMORANDUM OPINION AND ORDER

Adopted: January 20, 1995; Released: January 23, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On December 13, 1993, Insight Communications Company, ("Insight") filed a timely petition for reconsideration challenging the certification of Hamilton County, Indiana, ("the County") to regulate rates for basic cable service and associated equipment.[1] On August 18, 1994, Insight filed a supplement to its original petition, pursuant to a recent Commission Order.[2] In addition, Insight filed clarifying information regarding its subscribership in response to a Bureau request. The County did not file an opposition.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators which are not subject to effective competition.[3] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition unless the franchise authority has actual knowledge to the contrary.[4] Such certification becomes effective 30 days from the date of filing unless the Commission finds that the authority does not meet the statutory certification requirements.[5] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days of the date such certification becomes effective.[6] Regulation of rates is automatically stayed pending review of a timely filed petition for reconsideration alleging effective competition.[7]

II. DISCUSSION

3. Insight argues that its system serving the unincorporated areas of Hamilton County, its franchise area, is subject to effective competition because the system serves fewer than 30 percent of the households within its franchise area.[8] Insight's pleadings indicate that it serves a total of 4,090 of the 15,002 "homes" in the franchise area, or 27.3 percent of the total number of "homes". As supporting documentation, Insight submits a copy of a household trend report prepared by the Claritas/National Planning Data Corporation from which a 1992 estimate of 15,002 "housing units" in the unincorporated areas of Hamilton County is extrapolated.[9] In addition, Insight provides a computer printout as of January 7, 1995, which indicates that it serves a total of 4,090 subscribers.

4. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[10] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's Rules, is present within its franchise area.[11] Based on all of the evidence before us, we find that Insight has met this burden.

5. We note initially that Insight based its arguments on incorrect housing data. Insight bases its effective competition claim on "housing unit" (occupied and vacant) data. Our rules, however, require the use of data reflecting the number of "households" (i.e., occupied housing units) in

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[1] The County filed its Certification of Franchising Authority to Regulate Basic Cable Rates and Initial Finding of Lack of Effective Competition ("FCC Form 328") on October 18, 1993. Its certification became effective on November 17,1993.

[2] *Cable Operator's Petitions for Reconsiderationand Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates*, 9 FCC Rcd 3656 (1994).

[3] Communications Act of 1934 § 623 (a)(4), 47 U.S.C. § 543(a)(4).

[4] 47 CFR § 76.906, 76.910(b)(4).

[5] 47 C.F.R. §76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, and the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or(4) the cable system in question is not subject to effective competition. 47 C.F.R. § 76.910(b). *See* also 47 U.S.C. § 543(a)(4).

[6] 47 C.F.R. §§ 1.106, 76.911, *Report and Order and Further Notice of Proposed Rulemaking*, in MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[7] 47 C.F.R. §76.911(c).

[8] The Cable Act Communications Act of 1934 § 623 (a)(2), 47 U.S.C. § 534 (a)(2)) and the Commission's rules (47 C.F.R. § 76.905 (a)) provide that only the rates of cable systems that are not subject to effective competition may be regulated. One of the bases by which a cable system will be deemed subject to effective competition is if fewer than 30 percent of the households in the system's franchise area subscribe to the cable service of the system. Communications Act of 1934 § 623 (l)(1)(A), 47 U.S.C. § 543 (l)(1)(A); 47 C.F.R. §76.905 (b)(1).

[9] The report indicates there are 44,003 housing units in Hamilton County. From this number is subtracted the number of housing units in Arcadia Town (574), Atlanta Town (254), Carmel City (10,282), Cicero Town (1,416), Fishers Town (3,311), Fall Creek (1,688), Noblesville City (7,571), Sheridan Town (790), Wayne Township (841), Westfield Town (1,310), and White River Township (964). This calculation resulted in 15,002 housing units.

[10] 47 C.F.R. § 76.906.

[11] 47 C.F.R. § 76.911(b)(1).

the franchise area. *See Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) ("*Third Recon. Order*")[12] *Nonetheless, Insight's supplemental pleading does contain 1992 estimated households (i.e.,* occupied housing unit) data for Hamilton, County as well as for each incorporated town within Hamilton County. This data indicates that there are 14,382 households (that is, occupied housing units) in the unincorporated areas of Hamilton County according to 1992 estimates.[13] A comparison of the number of subscribers (4,090) in relation to household figure 14,382 yields a penetration level of 28.4 percent. Thus, we find that Insight's cable system serving the unincorporated areas of Hamilton County, Indiana is subject to effective competition. Accordingly, its petition is granted.

6. Finally, we note that the household trend report submitted by Insight also includes household data from the 1990 Census which indicates that, as of 1990, there were 13,311 households within the unincorporated areas of Hamilton County. A comparison of the number of subscribers (4,090) in relation to the number of households (13,311) yields a penetration level of 30.7 percent. Thus, it appears that if we were to rely on the 1990 Census, Insight's cable system would not be subject to effective competition. However, in this case we will accept Insight's use of 1992 estimated household numbers which is more recent than that contained in the 1990 Census. We have no evidence before us to suggest that this number is an inaccurate measure of the number of "households" in Insight's franchise area.

III. ORDERING CLAUSES

7. Accordingly, IT IS ORDERED that the petition for reconsideration filed by Insight Communications Company challenging the certification of Hamilton County, Indiana, to regulate its basic cable service rates IS GRANTED.

8. IT IS FURTHER ORDERED that the certification granted to Hamilton County, Indiana, to regulate Insight Communications Company's basic cable rates IS RESCINDED.

9. This action is taken pursuant to delegated authority, Section 0.321 of the Commission's Rules, 47 CFR § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[12] As the Commission stated in the *Third Recon. Order*, "[a]s used in the Cable Act, we presume that Congress did not intend "households" to have a different meaning than in the 1990 Census that would include vacant units or even partial year vacant units." *Third Recon. Order, supra*. The term "household" is defined for purposes of the 1990 Census data as "all the persons who occupy a housing unit". Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8. Thus, the term reflects only occupied housing units. The term "housing unit, "however, was defined by the Census Bureau to include both occupied and vacant housing units.

[13] The number of households for the unincorporated areas of Hamilton County can be calculated by taking the total number of households in Hamilton County according to the 1992 estimate (41,690) and subtracting from that number the number of households in the incorporated areas of Arcadia Town (544), Atlanta Town (244), Carmel City (9,732), Cicero Town (1,304), Fishers Town (3,073), Fall Creek (1,649), Noblesville City (7,083), Sheridan Town (736), Wayne Township (804), Westfield Town (1,254), and White River Township (885).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Letters of	LOI-93-1; LOI-93-3; LOI-93-13;
Inquiry on	LOI-93-15; LOI-93-16; LOI-93-17;
Negative Option	LOI-93-19; LOI-93-23;
Billing	LOI-93-24; LOI-94-2; LOI-94-5

CONSOLIDATED MEMORANDUM OPINION AND ORDER

Adopted: January 24, 1995; Released: January 25, 1995

By the Chief, Cable Services Bureau:

1. The Commission issued Letters of Inquiry ("LOIs") to the following operators requesting that they provide information concerning, among other things, compliance with the Communications Act's prohibition on negative option billing: C-TEC Cable Systems, City of McBain and Zeeland Charter Township, MI (LOI-93-1)[1] ; Comcast Cablevision, Howard County, MD (LOI-93-3); US Cable, Lake Forest and Lake Bluff, IL (LOI-93-13); Multivision Cable TV, Prince Georges County, MD (LOI-93-15); Time Warner Cable, Everett, Somerville and Winthrop, MA (LOI-93-16); Century Southwest Cable TV, Beverly Hills and Los Angeles, CA (LOI-93-17); Comcast Cablevision, Mount Clemens, MI (LOI-93-19); Nashoba Cable Services, Danvers, MA (LOI-93-23); Vision Cable of North Carolina, Charlotte, NC (LOI-93-24); Falcon Cable TV, Kitty Hawk, NC (LOI-94-2); and Warner Cable, Harrisonburg, VA (LOI-94-5) (collectively, the Operators).[2]

2. On or about September 1, 1993, the effective date of the Commission's rate regulation rules, nine of these Operators restructured their channel offerings so that certain channels that were previously offered on basic and cable programming services tiers were offered in a la carte packages.[3] Similarly, two of these Operators restructured their channel offerings by splitting an existing cable programming services tier into two tiers.[4] In addition, four of these Operators unbundled their programming service rates from equipment charges to create a separate charge for wire maintenance service.[5]

3. Based on the analysis set forth in our previous orders on negative option billing,[6] we conclude that the conduct of these Operators, during the time period addressed by the LOIs, with regard to automatically subscribing their customers to restructured or unbundled programming and equipment offerings did not violate the negative option billing provisions of federal law.

4. Accordingly, IT IS CONCLUDED that C-TEC Cable Systems, City of McBain and Zeeland Charter Township, MI (LOI-93-1); Comcast Cablevision, Howard County, MD (LOI-93-3); US Cable, Lake Forest and Lake Bluff, IL (LOI-93-13); Multivision Cable TV, Prince Georges County, MD (LOI-93-15); Time Warner Cable, Everett, Somerville and Winthrop, MA (LOI-93-16); Century Southwest Cable TV, Beverly Hills and Los Angeles, CA (LOI-93-17); Comcast Cablevision, Mount Clemens, MI (LOI-93-19); Nashoba Cable Services, Danvers, MA (LOI-93-23); Vision Cable of North Carolina, Charlotte, NC (LOI-93-24); Falcon Cable TV, Kitty Hawk, NC (LOI-94-2); and Warner Cable, Harrisonburg, VA (LOI-94-5), through the conduct described above, have not violated Section 3(f) of the 1992 Cable Act, 47 U.S.C. §543(f), or Section 76.981 of the Commission's rules. 47 C.F.R. § 76.981.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[1] This LOI addressed 14 other Michigan communities including: Wayland Township, City of Grayling, City of Grand Haven, City of Greenville, Caledonia Charter Township, Village of Spring Lake, Village of Pentwater, City of Stanton, City of Hudsonville, Robinson Township, City of Rockford, Cannon Township, City of Cadillac, and Grand Haven Charter Township. Our inquiry with respect to these communities was terminated. *Memorandum Opinion and Order, C-TEC Cable Systems*, LOI-93-1, DA 94-1622 (December 30, 1994).

[2] While other issues are raised in the LOIs, they are not addressed in this Consolidated Memorandum Opinion and Order.

[3] These operators are: C-TEC Cable Systems, City of McBain and Zeeland Charter Township, MI; Comcast Cablevision, Howard County, MD; US Cable, Lake Forest and Lake Bluff, IL; Multivision Cable TV, Prince Georges County, MD; Time Warner Cable, Everett, Somerville, Winthrop, MA; Century Southwest Cable TV, Beverly Hills and Los Angeles, CA; Nashoba Cable Services, Danvers, MA; Vision Cable of North Carolina, Charlotte, NC; and Falcon Cable TV, Kitty Hawk, NC.

[4] These operators are: Comcast Cablevision, Mount Clemens, MI and Warner Cable, Harrisonburg, VA.

[5] These operators are: Comcast Cablevision, Howard County, MD; Multivision Cable TV, Prince Georges County, MD; Comcast Cablevision, Mount Clemens, MI; and Nashoba Cable Services, Danvers, MA.

[6] *See Memorandum Opinion and Order, Warner Cable Communications*, LOI-93-14, DA 95-60 (released January 20, 1995) and *Memorandum Opinion and Order, Comcast Cablevision*, LOI-93-2, DA 95-61 (released January 20, 1995).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELE-MEDIA COMPANY OF
SOUTHEAST FLORIDA, INC.

Petition for Reconsideration
of Certification of
City of Pembroke Pines, Florida
to Regulate Basic Cable Service Rates
(FL0990, FL0729)

MEMORANDUM OPINION AND ORDER

Adopted: January 20, 1995; Released: January 23, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On December 6, 1993, Tele-Media Company of Southeast Florida, Inc. ("Tele-Media") filed a petition challenging the certification of the City of Pembroke Pines, Florida ("the City") to regulate rates for basic cable service and associated equipment.[1] On November 30, 1994, Tele-Media submitted clarifying information pursuant to a Bureau request.[2] The City did not file an opposition to Tele-Media's petition.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators which are not subject to effective competition.[3] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition unless they have actual knowledge to the contrary.[4] Certification becomes effective 30 days from the date of filing unless the Commission finds that the franchising authority does not meet the statutory certification requirements.[5] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days from the date such certification becomes effective.[6] Rate regulation is automatically stayed pending review of a timely-filed petition for reconsideration alleging the presence of effective competition.[7] Once the 30-day period for filing petitions for reconsideration has elapsed, cable operators may challenge a franchising authority's certification by filing a petition for revocation. Regardless of its grounds, however, a petition for revocation does not automatically trigger a stay of the franchising authority's power to regulate basic rates.[8]

II. DISCUSSION

3. Tele-Media bases its challenge on the competing provider test for effective competition set forth in the 1992 Cable Act and our rules.[9] Tele-Media argues that its system serving the City of Pembroke Pines is subject to effective competition because (1) its franchise area is served by both its system and Tele-Communications, Inc. ("TCI"), an unaffiliated multichannel video programming distributor ("MVPD"), and that each of them offers comparable programming to at least 50 percent of the households in the franchise area; and (2) the number of households subscribing to the smaller of the two systems, exceeds 15 percent of the households in the franchise area.[10]

4. Specifically, Tele-Media states that its system is authorized to provide cable service to subscribers in its franchise area, which comprises a total of 3,376

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[1] The City filed its "Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Lack of Effective Competition" (FCC Form 328) on September 20, 1993. Its certification became effective on October 20, 1993. A timely-filed petition for reconsideration challenging the City's certification would have to have been filed no later than November 19, 1993. *See* 47 C.F.R. §§ 1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, in MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993) (*"Rate Order"*). Tele-Media's petition was filed December 6, 1993, more than fifteen days after the last date for filing petitions for reconsideration. Because Tele-media's petition was not timely-filed, we will treat it as a petition for revocation, not as a petition for reconsideration. *See* 47 C.F.R. § 76.914.

[2] Letter of Jonathan P. Young, Corporate Legal Affairs Counsel, dated November 30, 1994.

[3] Communications Act of 1934 § 623(a)(4); 47 U.S.C. § 543(a)(4)

[4] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[5] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, and the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition.47 C.F.R. § 76.910(b). *See also* Communications Act of 1934 § 623(a)(4); 47 U.S.C. § 543(a)(4).

[6] 47 C.F.R. §§ 1.106, 76.911, *Rate Order*, *supra*, note 1.

[7] 47 C.F.R. § 76.911(c).

[8] 47 C.F.R. § 76.914.

[9] The 1992 Cable Act and the Commission's Rules provide that only the rates of cable systems that are not subject to effective competition may be regulated. Communications Act of 1934 § 623(a)(2); 47 U.S.C. § 543(a)(2); 47 C.F.R. § 76.905(a). One of the bases by which a cable system will be deemed subject to effective competition is if the franchise area is: 1) served by at least two unaffiliated multichannel video programming distributors ("MVPDs") each of which offers comparable programming to at least 50 percent of the households in the franchise area; and 2) the number of households subscribing to multichannel video programming other than the largest MVPD exceeds 15 percent of the households in the franchise area. Communications Act of 1934 § 623(l)(1)(B); 47 U.S.C. § 543(l)(1)(B); 47 C.F.R. § 76.905(b)(2).

[10] The 1992 Cable Act and our rules require that the smaller MVPD serve over 15 percent of the households in the franchise area. Communications Act of 1934 § 623(l)(1)(B), 47 U.S.C. § 543(l)(1)(B); 47 C.F.R. § 76.905(b)(2).

"households."[11] Tele-Media states that its household number is based on a count of actual occupied homes within the franchise area. Next, Tele-Media claims, in its petition, that "[b]oth Tele-Media and TCI offer comparable video programming to at least 50% of the households." In its supplement, Tele-Media goes on to state that TCI "provides comparable cable television service to 100% of the cable subscribers in Tele-Media's franchised area." The only supporting documentation provided by Tele-Media is a chart which indicates that there are a total of 3,376 "homes passed" or "potential homes passed" in Tele-Media's franchise area. This chart, however, does not indicate whether Tele-Media and TCI each pass all of the 3,376 households or whether this number represents the total number of households passed by both operators in the aggregate. Tele-Media submits no other evidence which could support its claim that it or TCI offers comparable programming to at least 50 percent of the households in its franchise area. Indeed, Tele-Media never clearly indicates the specific actual number of homes passed by it or TCI.

5. With respect to subscribership, Tele-Media claims that its system actually serves 1,346 of the 3,376 households, or 40 percent of the households in its franchise area. Moreover, it states that TCI's system serves 1,558 of the 3,376 households, or 46 percent of the households in its franchise area. Tele-Media states that the subscriber number attributed to TCI is actually an estimate based on a count of all cable subscribers in Tele-Media's franchise area that are not served by Tele-Media. It is not clear, from Tele-Media's petition, however, how many cable subscribers are in its franchise area or how the total number of subscribers was determined. Thus, we can not determine whether Tele-Media's estimate of TCI's subscribership in Tele-Media's franchise area is accurate. The only other evidence regarding TCI's subscribership is a letter from TCI in which TCI states that it serves 15,858 subscribers. This number, however, is the total number of subscribers served in TCI's franchise area and not the total number served in Tele-Media's franchise area, which is the relevant franchise area for purposes of this proceeding.

6. With respect to programming comparability, Tele-Media submits copies of channel line-ups for both Tele-Media and TCI.[12] These line-ups show that Tele-Media offers at least 50 channels of video programming, including at least 30 non-broadcast channels. TCI offers at least 50 channels of video programming, including at least 30 non-broadcast channels.

7. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[13] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's rules, is present within its franchise area.[14] Tele-Media has not met this burden. As to the first prong of this test, Tele-Media has not submitted information sufficient to demonstrate that it and TCI each pass at least 50 percent of the households in the franchise area. In its petition, Tele-Media merely states that "[b]oth Tele-Media and TCI offer comparable video programming to at least 50 percent of the households." Tele-Media later claims without sufficient supporting evidence, that TCI offers comparable programming to 100 percent of the households in Tele-Media's franchise area. These statements are conclusory. Tele-Media alleges no specific facts and submits no supporting documentation which demonstrates that TCI passes any homes in Tele-Media's franchise area. There have been previous cases where, in the absence of sufficient evidence regarding the number of households passed, we have been able to determine that a cable operator passes at least 50 percent of the households in the franchise area.[15] In those cases, this determination has been made where the cable operator has demonstrated that it or its competitor actually serve at least 50 percent of the households in the franchise area. Such a determination can not be made in this case, however, as Tele-Media claims that it serves only 40 percent of the households in its franchise area, while it claims that TCI serves only 46 percent. Tele-Media has not submitted sufficient information either demonstrating that its cable system, or TCI's, offer service to at least 50 percent of the households in the franchise area, or enabling us to make the calculation regarding its claims ourselves.

8. With regard to the issue of programming comparability, we find that Tele-Media has submitted sufficient evidence that the programming of it and TCI are comparable. The channel line-ups for both operators submitted by Tele-Media establish that each operator offers at least 50 channels with at least 30 non-broadcast channels – this satisfies the Commission's programming comparability criteria.

9. Next, Tele-Media argues that more than 15 percent of the households subscribe to the cable service of the smaller of the two systems in the franchise area. In light of Tele-Media's failure to submit sufficient evidence that it and TCI each pass at least 50 percent of the households in the franchise area, we are unable to reach this conclusion. As we stated in the *Rate Order*, "only those multichannel video programming distributors that offer programming to at least 50 percent of the households in the franchise area should be included" in the cumulative measurement of households subscribing to the cable services of " MVPDs other than the largest MVPD.[16] As Tele-Media has failed to establish that it and TCI each pass at least 50 percent of the households in its franchise area, we can not find that Tele-Media has met the second prong of the test. In any event, *assuming arguendo*, that Tele-Media could submit

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[11] Tele-Media is franchised to serve only a portion of the City of Pembroke Pines, whereas TCI is franchised to serve the entire city, including the portion that defines Tele-Media's franchise area. Accordingly, TCI's system operates within Tele-Media's franchise area.

[12] Competing MVPDs must offer comparable video programming to households in the franchise area. *See* 47 C.F.R. § 76.905(b)(2). As the Commission has stated previously, in order to provide "comparable" video programming, a MVPD must provide at least 12 channels of video programming, including at least one non-broadcast channel. *See Rate Order*, at 5667.

[13] 47 C.F.R. § 76.906.

[14] 47 C.F.R. § 76.911(b)(1).

[15] *See e.g., Blue Ridge Cable Television, Inc., Petition for Reconsideration of Certification of Township of Heidelberg, PA*, DA 94-1525 (released December 20, 1994). *Twin County Trans Video, inc. d/b/a Twin County Cable, Petition for Reconsideration of Certification of Township of Heidelberg, PA*, DA 94-1526 (released December 20, 1994).

[16] *Rate Order*, at 5665.

sufficient evidence to meet the first prong of the competing provider test, we still could not find that it has met the second prong of the test. As noted above, Tele-Media does not submit sufficient evidence supporting its alleged subscriber numbers for TCI. As such, it is unclear whether Tele-Media or TCI is the largest of the two MVPDs.[17] Accordingly, we can not find that Tele-Media has met the second prong of the competing provider test.[18]

10. As Tele-Media has failed to submit sufficient evidence demonstrating that its cable system serving a portion of the City of Pembroke Pines is subject to effective competition from another cable operator, its petition is denied. Should Tele-Media wish to submit more specific information in support of its effective competition claim, it may do so by filing a petition for revocation pursuant to Section 76.914 of the Commission's rules.[19]

11. Finally, we note, in enacting the 1992 Cable Act, Congress' policy was "to promote the availability to the public of a diversity of views and information;" and to rely on the marketplace, to the maximum extent feasible, to achieve that availability."[20] In this case, Tele-Media argued that its cable system was subject to effective competition as defined by the 1992 Cable Act. However, because Tele-Media failed to support this effective competition claim, we deny its petition. Nonetheless, we take this occasion to state our view that in the case of the cable programming service tier ("CPST") there may be circumstances where a cable system, although not subject to effective competition as defined in the 1992 Cable Act, may be charging cable rates that are constrained by the presence of one or more other multichannel video programming distributors (MVPDs) in the franchise area. In such situations, the presence of one or more such MVPDs may ensure that the rates the operators charge subscribers for CPSTs are not "unreasonable." In such instances, the public interest may be served by relying on the market forces instead of our rate rules to ensure that the operator's rates are not "unreasonable."[21] In this case, Tele-Media has not submitted sufficient economic evidence and analysis regarding its competitor's presence in its franchise area or any other market forces which would allow us to determine that its rates are constrained by competition. Should Tele-Media or any other operator choose to submit such information, we could consider such a showing in the context of a petition for special relief filed pursuant to Section 76.7 of the Commission's rules.[22]

III. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED that the petition for revocation filed by Tele-Media Company of Southeast Florida, Inc., challenging the certification of the City of Pembroke Pines, Florida to regulate Tele-Media's basic cable rates IS DENIED.

13. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[17] Indeed, in its own analysis, we note that Tele-Media claims that TCI meets the second prong of the test. At the same time, Tele-Media is alleging facts which indicate that it is Tele-Media and not TCI which is the smaller of the two operators.

[18] We note that by letter dated December 15, 1994, the Bureau requested clarifying information regarding Tele-Media's claims. Letter from Brent Olson to Jonathan P. Young, Corporate Counsel for Tele-Media, dated December 15, 1994. Tele-Media did not respond to our letter.

[19] 47 C.F.R. § 76.914.C

[20] *See* Cable Television Consumer Protection and Competition Act of 1992 § 2(b), Pub. L. No. 102-385, 106 Stat. 1460.

[21] *Cf. Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992; Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking*, MM Docket Nos. 92-266 and 93-215, FCC 94-286, ¶ ¶ 16-37 (adopted: November 10, 1994).

[22] 47 C.F.R. § 76.7.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PONDEROSA CABLE SYSTEMS, LTD.

Petition for Reconsideration
of Certification of
Town of Danville, California
to Regulate Basic Cable Service Rates
(FCC Community ID No. CA1061)

MEMORANDUM OPINION AND ORDER

Adopted: January 20, 1995; Released: January 23, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On December 22, 1993, Ponderosa Cable Systems, Inc. ("Ponderosa") filed a timely petition for reconsideration challenging the certification of the Town of Danville, California ("The Town") to regulate rates for basic cable service and associated equipment.[1] In addition, Ponderosa submitted a supplement to its petition containing supporting documentation pursuant to a recent Commission Order.[2] Ponderosa later filed a response to the Bureau's request for clarifying information.[3] The Town did not file an opposition to Ponderosa's petition.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators which are not subject to effective competition as defined by the Communications Act of 1934.[4] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to such effective competition unless they have actual knowledge to the contrary.[5] Such certification becomes effective 30 days from the date of filing unless the Commission finds that the authority does not meet the statutory certification requirements.[6] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days of the date such certification becomes effective.[7] Rate regulation is automatically stayed pending review of a timely filed petition for reconsideration alleging effective competition as defined by the Communications Act of 1934.[8]

II. DISCUSSION

Petitioner's Contentions

3. Ponderosa bases its challenge on the competing provider test for effective competition.[9] In the circumstances presented here, this test requires Ponderosa to show that its system serving the Town is subject to effective competition because its franchise area is: 1) served by itself and TCI Cablevision of Contra Costa County ("TCI"), an unaffiliated multichannel video programming distributor ("MVPD") and that each offers comparable programming to at least 50% of the households in the franchise area; and 2) the number of households subscribing to the smaller operator, exceeds 15% of the households in the franchise area.

4. In its pleadings, Ponderosa states that there are 1,227 "homes" in the franchise area.[10] and that "TCI and/or Ponderosa have plant activated to serve 75% [sic], i.e. 950

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[1] The Town of Danville filed its Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Lack of Effective Competition (FCC Form 328) on November 1, 1993. Its certification became effective on December 1, 1993.

[2] *Cable Operators' Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates*, 9 FCC Rcd 3656 (1994) (*"Effective Competition Order"*).

[3] Letter from Daren A. Benzi to Harold R. Farrow, Attorney for Ponderosa Cable Systems (December 16, 1994).

[4] Communications Act of 1934 § 623(a)(4), 47 U.S.C. § 543(a)(4).

[5] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[6] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, and the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition. 47 C.F.R. § 76.910(b). *See also* 47 U.S.C. § 543(a)(4).

[7] 47 C.F.R. §§ 1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, in MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993) (*"Rate Order"*).

[8] 47 C.F.R. § 76.911(c).

[9] The 1992 Cable Act (Communications Act of 1934, § 623(a)(2), 47 U.S.C. § 543(a)(2)) and the Commission's rules (47 C.F.R. § 76.905(a)) provide that only the rates of cable systems that are not subject to effective competition may be regulated. The Cable Act and the Commission's rules further provide three alternative tests for determining the presence of effective competition. The test relied upon by Ponderosa provides that a cable system is subject to effective competition if the franchise area is: 1) served by at least two unaffiliated multichannel video programming distributors each of which offers comparable programming to at least 50% of the households in the franchise area; and 2) the number of households subscribing to multichannel video programming other than the largest multichannel video programming distributor exceeds 15% of the households in the franchise area. Communications Act of 1934 § 623(1)(1)(B), 47 U.S.C. §543(1)(1)(B); 47 C.F.R. §76.905(b)(2)(i) and (ii).

[10] Ponderosa states that the land, referred to by Ponderosa as the Town portion of the franchise area, was annexed to the Town of Danville after Ponderosa had already been granted a franchise to serve Contra Costa County. Thus, according to Ponderosa, the operator is serving the Town of Danville under its franchise with the County. In light of this, it is not clear whether the Town of Danville or Contra Costa County is the

homes." Ponderosa refers to these 950 homes as "completed homes." Ponderosa states that "the remaining [sic] 307 homes, most of which are still under construction, are currently passed by conduit only, not by activated plant," and that these are "homes which are under construction and thus need not be included."[11] Ponderosa claims that out of 950 "completed homes," in the Town of Danville, 724, or 76.2% have the technical and actual opportunity to subscribe to either TCI or Ponderosa; however, Ponderosa does not indicate how it arrives at these figures.

5. Next, Ponderosa does not provide separate subscriber numbers for it or TCI with respect to the Town of Danville franchise area. With respect to subscribership data, Ponderosa states only that TCI serves 40% of the entire Contra Costa County, which includes the Town of Danville. However, this statement is not evidence of either cable operator's subscribership within the Town of Danville, the relevant franchise area in this case. As supporting documentation, Ponderosa provides a copy of its franchise agreement with Contra Costa County, and a map which Ponderosa claims represents the entire franchise area, which includes the Town of Danville. Ponderosa also submits a copy of its channel line-up which indicates that Ponderosa offers a total of 80 channels, including more than 70 non-broadcast channels. In addition, Ponderosa also submits a copy of TCI's channel line-up which indicates that TCI offers a total of 42 channels, including more than 30 non-broadcast channels.

6. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[12] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's rules, is present within its franchise area.[13] Based on the evidence, we find that Ponderosa has not met this burden. Ponderosa has provided us with a great amount of information. Unfortunately, Ponderosa has not provided us with the critical information, with respect to the circumstances in the Town of Danville, that we need to determine that it has met the test. This is so even though we asked for further information. In fact, Ponderosa stated that it refused to provide additional information.

7. First, Ponderosa fails to demonstrate that it and TCI each offer comparable programming to at least 50% of the households in the franchise area as required by the first prong of the competitive providers test.[14] The information provided by Ponderosa does not enable us to determine that the circumstances in the Town of Danville satisfy the first prong of the competing provider test. It is unclear whether Ponderosa is claiming that it and TCI together offer comparable programming to at least 50% of the households in the franchise area or whether it is claiming that each operator separately offers comparable programming to at least 50% of the households in the franchise area. Ponderosa's failure to clarify this point, even after requested to do so, is fatal to its claim. Next, Ponderosa's claim is inappropriately based on the number of "homes" passed in the franchise area. Our rules, however, require the use of data reflecting the number of "households" (*i.e.*, occupied housing units) passed in the franchise area. *See Third Order on Reconsideration*, in MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (*"Third Recon. Order"*) .[15] In some cases, we have been able to make a determination of households passed by making calculations from data on housing units passed compared to subscriber lists.[16] Such an analysis cannot be made in this case, in part because we do not have clear information on each of the two systems separately, with respect to the number of households each passes, or the number of housing units each passes, or the number of subscribers each has within the Town of Danville. Such information is required in order to support a claim that a franchise area is served by at least two unaffiliated MVPD's offering comparable programming to at least 50% of the households in the franchise area.

8. With regard to the issue of programming comparability, we find that Ponderosa has submitted sufficient evidence that the programming of the two operators are comparable. The channel lineups for both operators submitted by Ponderosa establish that each operator offers over 40 channels with more than 25 non-broadcast channels -- this satisfies the Commission's programming comparability criteria.[17]

9. With regard to the second prong of the competitive providers effective competition test, we find that Ponderosa has not submitted sufficient evidence showing that more than 15% of the households in the Town of Danville, the relevant franchise area, subscribe to multichannel video programming other than from the largest MVPD. As we stated above, Ponderosa appears to aggregate its and TCI's subscriber numbers rather than providing them separately, as the rules require. Thus, it is unclear whether Ponderosa or TCI is the larger of the two systems and what percentage each has of subscribers compared to households passed. As

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franchisor. However, neither the cable operator nor the Town has raised this issue, or submitted information regarding it. Therefore, we will not address this issue.

[11] There appears to be some miscalculation by Ponderosa as to the number of homes to which TCI and Ponderosa have plant activated to serve. Ponderosa states that it and/or TCI are plant activated to serve 75% of the 1,227 homes. Ponderosa claims that this represents 950 homes. Our calculations, however, indicate that 75% of 1,227 homes yields 920 homes. As Ponderosa does not provide information which supports its references to the 75% of homes, the 950 homes, or the 307 uncompleted homes, there is no basis by which we can verify whether any of these numbers are accurate.

[12] 47 C.F.R. § 76.906.

[13] 47 C.F.R. § 76.911(b)(1).

[14] 47 C.F.R. §76.905(b)(2)(i).

[15] As the Commission stated in the *Third Recon. Order*, "[a]s used in the Cable Act, we presume that Congress did not intend "households" to have a different meaning than in the 1990 Census that would include vacant units or even partial year vacant units." *Third Recon. Order, supra*. The term "household" is defined for purposes of the 1990 Census data as "all the persons who occupy a housing unit." Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8. Thus, the term reflects only occupied housing units. The term "housing unit," however, was defined by the Census Bureau to include both occupied and vacant housing units.

[16] *See, e.g., Twin County Trans Video, Inc.*, DA 94-1526 (released December 21, 1994), and *Blue Ridge Cable Television, Inc.*, DA 94-1525 (released December 20, 1994).

[17] Section 76.905(g) of the Commission's rules states that in order to offer comparable programming, a competing multichannel video programming distributor must offer at least 12 channels of video programming, including at least one channel of nonbroadcast service programming. 47 C.F.R. § 76.905(g).

such, a determination cannot be made as to whether more than 15% of the households subscribe to the service of a MVPD other than the largest one.

10. As Ponderosa has not submitted sufficient evidence demonstrating that its cable system serving the Town of Danville is subject to effective competition from another cable operator, its petition is denied. Should Ponderosa wish to submit more specific information in support of its effective competition claim, it may do so by filing a petition for revocation pursuant to Section 76.914 of the Commission's rules.[18]

III. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED that the petition for reconsideration filed by Ponderosa Cable Systems, Ltd. challenging the certification of the Town of Danville, California to regulate Ponderosa's basic cable rates IS DENIED.

12. IT IS FURTHER ORDERED that the automatic stay imposed by Section 76.911(c) of the Commission's Rules, as amended, 47 C.F.R. § 76.911(c) IS TERMINATED.

13. IT IS FURTHER ORDERED that Ponderosa SHALL FILE the required rate justifications on the appropriate forms with the Town of Danville, CA within thirty days of the release date of this *Memorandum Opinion and Order* or within thirty days of receipt of notice from the franchising authority that it is regulating Ponderosa's rates, whichever is later.

14. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's rules, as amended, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[18] 47 C.F.R. § 76.914.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: January 26, 1995

CC DOCKET NO. 86-10

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON BELLSOUTH'S PETITION FOR WAIVER OF THE COMMISSION'S ACCESS TIME STANDARDS FOR 800 DATA BASE SERVICE

On January 20, 1995, BellSouth Telecommunications, Inc. (BellSouth) filed a petition for waiver of the access time standards established in the Commission's *Memorandum Opinion and Order on Reconsideration and Second Supplemental Notice of Proposed Rulemaking*, CC Docket No. 86-10, 6 FCC Rcd 5421 (1991). Pursuant to these standards, the Bell Operating Companies and GTE Telephone Companies are required to reduce access times to five seconds or less for 97% of their originating 800 traffic by March 1993, and for all of their data base 800 traffic within two years thereafter. In addition, by March 1, 1995, the mean access time for each LEC's 800 data base traffic must be 2.5 seconds or less.

BellSouth states that it will be unable to meet this standard with respect to 800 service traffic originating from the central offices of Bridgeport, Alabama, and Stevenson, Alabama. BellSouth states that it has attempted to install new fiber optic and electrical multiplexing equipment within these central offices, but that it has experienced problems with city officials. BellSouth states that the proposed improvements are essential to implementing signaling system 7 (SS7) technology for service to Bridgeport and Stevenson. BellSouth argues that without SS7 capability it will be unable to achieve the prescribed access time standard for 800 service traffic. BellSouth adds that alternative technology is not feasible. BellSouth states that it is attempting to resolve the issues with the city. BellSouth seeks a waiver of the requirements until it receives authorization from the city and is able to accomplish network upgrades.

Interested parties should file comments on BellSouth's waiver petition **February 6, 1995** and reply comments by **February 13, 1995**, with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. Copies should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: ITS, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the waiver request can be obtained from ITS at (202) 857-3800.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally* 47 C.F.R. §§ 1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 418-1579.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Tele-Communications, Inc., and TeleCable Corporation — File Nos. CAR-44932-09 et. al.

Transfer of Control

MEMORANDUM OPINION AND ORDER

Adopted: January 25, 1995; Released: January 26, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On September 13, 1994, Tele-Communications, Inc. ("TCI"), filed applications for authority to transfer, pursuant to section 310(d) of the Communications Act, 47 U.S.C. § 310(d), five Cable Television Relay Service (CARS) licenses from the TeleCable Corporation ("TeleCable"). TCI is applying for these license transfers as part of its proposed merger of the TCI and the TeleCable cable systems. As explained below, the Bureau finds that, subject to certain conditions, approving the proposed license transfers will serve the public interest, convenience and necessity. Therefore, the Bureau grants the transfer applications. In so doing, however, the Bureau imposes a condition that it determined to be necessary to guard against otherwise possible anticompetitive conduct.

II. BACKGROUND

2. TCI is the largest multiple systems operator ("MSO") of cable television systems in the United States,[1] with attributable interests in cable systems which distribute video programming to approximately 13.5 million subscribers,[2] approximately 24.8 percent of the subscribers in the United States.[3] TCI has cable systems in, at least 47 states, including a system in Columbus, Georgia.[4] TCI generated over $5.3 billion in revenues in 1993.[5] As of June 30, 1994, TCI had total assets exceeding $18.8 billion, including financial or managerial interests in several suppliers of video programming to cable television systems and other multichannel video programming distributors, as well as interests in various multichannel video distribution technologies.[6]

3. TeleCable is also an MSO, which owns and operates twenty-one cable television systems in 15 states.[7] As of June 30, 1994, these systems served approximately 738,000 subscribers in 112 franchised areas in Alabama, Florida, Georgia, Illinois, Indiana, Kansas, Kentucky, Missouri, North Carolina, South Carolina, Tennessee, Texas, Virginia, West Virginia and Wisconsin.[8] One of TeleCable's systems is in Columbus, Georgia. This system and TCI's Columbus system are both authorized to serve the same franchise area in Columbus, (i.e., the entire city), and both systems offer cable service to some of the same Columbus neighborhoods, the "overbuild area."[9] Two of the five CARS licenses that TCI seeks to transfer from TeleCable to TCI are used as part of TeleCable's operation of its Columbus system.

4. As a result of the proposed merger, TCI would have attributable interests in cable systems that provide service to more than 14 million subscribers, approximately 29.4% of all cable subscribers nation-wide.[10] The merged entity is projected to have approximately $21 billion in assets and would generate over $5.6 billion per year in revenue.[11]

5. TCI's applications to transfer the TeleCable Cable Television Relay Service (CARS) licenses to TCI, Inc., were placed on public notice on October 5, 1994. No comments or petitions to deny were filed.

6. Because the proposed merger would eliminate competition between TCI and TeleCable in Columbus, Georgia, the staff requested additional information from the applicants. On December 6, 1994, counsel for TCI and TeleCable submitted a response to these requests.[12]

III. DISCUSSION

7. As the Bureau recently recognized, the Commission's public interest responsibilities under Title III of the Communications Act require it to examine competitive issues raised by proposed CARS transfer applications. If the Commission or the Bureau finds that the proposed transaction would result in anti-competitive effects, the Commission or the Bureau may impose appropriate remedial conditions.[13]

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[1] Tele-Communications, Inc., *Form S-4* at 1 (October 24, 1994)("S-4").

[2] *Tele-Communications, Inc. & Liberty Media Corp., Memorandum Opinion & Order*, DA 94-8321 (File Nos. CAR-44064, *et al.*, August 1, 1994)(Chief, Cable Services Bureau) *"TCI-Liberty"*) at ¶ 2 n.4.

[3] *See* First Report to Congress on the Status of Competition in the Market for Video Programming (September 28, 1994) ("1994 Cable Report") at ¶ 143.

[4] Warren Publishing, Inc., 1994 R= Television and Cable FactBook ("R= FactBook").

[5] S-4 at 11.

[6] S-4 at 12 and 31. *See TCI-Liberty* at ¶ ¶ 4-5. The TCI combination with Liberty Media Corporation was consummated August 4, 1994. S-4 at F-136.

[7] S-4 at 1.

[8] S-4 at 28.

[9] Letter dated December 6, 1994 from Paul Glist, Esq., to Commission staff ("TCI First Submission").

[10] The 29.4% is calculated by adding TCI's and Liberty Media Corp.'s shares from the *TCI-Liberty Order*. To that sum, the Bureau added TeleCable's share, which is calculated by dividing the 738,000 Telecable subscribers, by the total number of subscribers nation-wide. *See TCI-Liberty* at ¶ ¶ 2, 3, and note 4.

[11] S-4 at 11.7.

[12] TCI First Submission.

[13] *TCI-Liberty* at ¶ 16; *Cox Cable Communications, Inc., and Times Mirror Company, Memorandum Opinion and Order*, DA 94-1570 (File Nos. CAR-44842, *et al.*, and CSR-4375, December 22, 1994) (Chief, Cable Services Bureau) at ¶ 16.

8. In the Columbus, Georgia overbuild area, consumers can choose cable service from either TCI or TeleCable. TeleCable's Columbus system passes 40,000 homes and serves 32,100 subscribers.[14] TCI's system passes 27,509 homes and has 12,537 subscribers.[15] There are 2,828 homes in the overbuild area.[16] Of those homes, TeleCable serves approximately 1,400-1500.[17] TCI serves approximately 98 homes in the overbuild area.[18] The proposed acquisition would result in the elimination of competition in Columbus, Georgia, as well as the elimination of this overbuild.

9. As the Commission said in its report on competition in the delivery of video programming, competition from overbuilding frequently benefits consumers by lowering cable rates and improving service.[19] In the overbuild area, consumers can choose between TeleCable and TCI's somewhat different programming offered at different prices. For example, TeleCable offers 26 channels of basic service for $12.16 and 16 additional channels of satellite delivered programming for $8.71, a total of $21.37 for 42 channels. TCI offers 38 channels of basic programming for $14.91 and 7 additional channels for $1.00, a total of $15.91 for 45 channels. TeleCable's first premium channel, such as HBO, sells for $10.00. TCI offers HBO for $12.45. TeleCable's converter price is $2.96, whereas TCI's addressable converter rents for $1.26 per month. TeleCable charges $40.55 and TCI charges $20 to install cable service. TeleCable offers three non-premium channels that TCI does not offer. Each offer an independent TV channel that the other does not. TCI offers five non-premium satellite delivered channels that TeleCable does not.[20]

10. TCI's proposed acquisition of TeleCable, its direct competitor in Columbus, would eliminate competition between the two, would be likely to injure consumers, and would not be in the public interest. The parties have not shown that the acquisition of the Columbus system would result in efficiency gains[21] that reasonably cannot be achieved by the parties through other means and that those gains, if any, exceed the competitive risks identified above.[22] If the proposed merger and license transfer applications were approved unconditionally, the merger would eliminate consumer choice between different program offerings at different prices. Based on similar concerns, the Federal Trade Commission ("FTC") entered into an agreement with TCI, requiring TCI to divest itself of either the TCI or TeleCable cable systems in Columbus, Georgia.

11. Based on these findings and subject to the conditions imposed in this Order, the Bureau concludes that competition will not be diminished by the proposed acquisition and transfer of the CARS licenses. Therefore, approving the CARS transfer applications will serve the public interest.

IV. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED that the pending CARS license transfer applications referenced herein shall be GRANTED, subject to the following condition.

13. IT IS FURTHER ORDERED that, TCI divest itself of either the TCI cable television system in Columbus, Georgia or the TeleCable cable television system in Columbus, Georgia.

14. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321 (1993).

15. This order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[14] TCI First Submission at 2-3.
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] 1994 Cable Report at ¶ ¶ 54-60.
[20] TCI First Submission and attachments thereto.
[21] A letter dated January 12, 1995 from Paul Glist, Esq., to the Commission staff refers to the "obvious benefits incident to clustering" of cable television systems. The letter identifies certain of these benefits but does not make any showing that such benefits will accrue in Columbus, Georgia.
[22] *See* United States Dep't of Justice & Federal Trade Comm'n, 1992 Horizontal Merger Guidelines ¶ ¶ 0.2, 4, 4 Trade Reg. Rep. (CCH) ¶ 13,104 at 20,571, 20,573-11, 20,574.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-250

In the Matter of

Amendment of Section 73.202(b),	RM-8331
Table of Allotments,	RM-8397
FM Broadcast Stations.	RM-8398
(Fairview and Cambridge Springs, Pennsylvania, and North Kingsville, Ohio)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 14, 1995; Released: February 23, 1995

By the Chief, Allocations Branch:

1. At the request of KDC, Inc. ("KDC"), the Commission has before it the *Notice of Proposed Rule Making*, 8 FCC Rcd 7104 (1993), proposing the allotment of Channel 298A to Fairview, Pennsylvania, as the community's first local aural transmission service. KDC filed comments reiterating its intention to apply for Channel 298A, if allotted. Counterproposals were filed by North Kingsville Broadcasting ("NKB") requesting the allotment of Channel 298A to North Kingsville, Ohio, and Thomas J. Sauber ("Sauber") requesting the allotment of Channel 298A to Cambridge Springs, Pennsylvania.[2] Reply comments were filed by KDC, NKB and Sauber. Co-channel Class A allotments are required to be separated by at least 115 kilometers. However, neither Fairview, Cambridge Springs nor North Kingsville are located sufficiently far apart to comply with the spacing requirements. Therefore, the proposals are mutually exclusive.

2. NKB requests the allotment of Channel 298A to North Kingsville, Ohio, as the community's first local aural transmission service, and states its intention to apply for the channel, if allotted. NKB points out that North Kingsville is incorporated and listed in the 1990 U.S. Census with a population of 2,672 persons. According to NKB, North Kingsville has its own local government, consisting of a mayor and eight council members, as well as its own fire and police departments. It believes that North Kingsville is more deserving of the channel allotment than Fairview because Fairview is considerably smaller in population, with a 1990 U.S. Census population of 1,988 persons, and with its proximity to Erie, Pennsylvania, population 108,718 persons and nine local aural facilities, enjoys more reception service than North Kingsville. According to NKB, the closest community of significant size to North Kingsville is Astabula, Ohio, population 21,633 persons and three local aural services. NKB states that Channel 298A can be allotted to North Kingsville in compliance with the Commission's minimum distance separation requirements with regard to domestic and Canadian allotments if the power does not exceed the 6 kW maximum for Class A stations. However, because Class A channels are treated as Class B1 channels with regard to Canada, a short-spacing to vacant Channel 298A at Welland, Ontario, occurs. Therefore, NKB requests that concurrence be sought from Canada as a specially negotiated allotment.

3. Sauber requests the allotment of Channel 298A to Cambridge Springs, Pennsylvania, as its first local aural transmission service and states his intention to apply for the channel, if allotted. Sauber, citing *Eatonton, Sandy Springs, Georgia; Anniston, Lineville, Alabama* (*"Sandy Springs"*), 6 FCC Rcd 6580 (1991), argues that Fairview should not be awarded a first local service preference but instead should be credited with the services licensed to nearby Erie, Pennsylvania.[3] In deciding the *Sandy Springs* case, Sauber states that the Commission looked at the following three factors: (1) signal population coverage; (2) size and comparative population; and (3) the interdependence of the suburban community and the metropolis.[4] In this case, Sauber states that a Fairview station will serve Erie since it is located less than ten miles from downtown Erie, Fairview has a population of only 1,988 persons compared to a population of 108,718 persons for Erie, and finally, that KDC has provided no demographic data showing that Fairview is independent of the larger community of Erie or that Fairview has economic, political and cultural organizations which identify themselves with the smaller community. Sauber faults KDC for not providing this information, contending that it is long-held Commission policy that where a party has the ability to produce evidence, its failure to do so creates a presumption that the evidence would be detrimental to that party's case, citing *Washoe-Shosone Broadcasting*, 3 FCC Rcd 3948, 3953 (Rev. Bd. 1988).

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[1] The communities of Cambridge Springs, Pennsylvania, and North Kingsville, Ohio, have been added to the caption.

[2] Public Notice of the filing of the counterproposals was given on December 6, 1993, Report No. 1989.

[3] In *Sandy Springs* the Commission denied a request to change the community of license for an FM station at Anniston to specify Sandy Springs. Although the petitioner had sought a first local service preference for the Sandy Springs allotment, the Commission, based upon a finding that the community is located within, and not sufficiently independent of, the Atlanta Urbanized Area, credited Sandy Springs with having all of the aural services licensed to communities within the Atlanta Urbanized Area.

[4] The factors used in *Sandy Springs* to determine the independence of a community are derived from Commission decisions in *RKO General (KFRC)*, 5 FCC Rcd 3222 (1990), and *Faye and Richard Tuck ("Tuck")*, 3 FCC Rcd 5374 (1988). However, we find that Sauber's reference to *Sandy Springs* is not on point. In *KFRC*, *Tuck* and *Sandy Springs*, the Commission set forth the type of evidence to consider in determining whether a suburban community should be denied a first local service preference when requesting a change of community of license. *See Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989), *recon. granted in part*, 5 FCC Rcd 7094 (1990). KDC is not requesting a change of community of license but rather a new allotment.

4. As to Cambridge Springs, Sauber states that it is an isolated community of 1,837 persons in northwestern Pennsylvania. In contrast to Fairview, Cambridge Springs is located more than 20 miles from downtown Erie and 13 miles from Meadville, Pennsylvania (1990 Census population of 14,318 persons). Cambridge Springs has its own local government as well as its own police department, volunteer fire and ambulance departments, schools, library, municipal garage and senior center. Cambridge Springs also has numerous businesses, churches and several manufacturing plants. Additionally, the community has a large State correctional institution.

5. In reply comments, KDC submits that all three proposals can be accommodated. To this end, it suggests that Channel 241A be allotted to North Kingsville, Channel 283A to Cambridge Springs, and Channel 298A to Fairview. KDC states that the North Kingsville and Cambridge Springs channels can be allotted at the coordinates proposed by the respective petitioners and operated nondirectionally with 6 kW of power. KDC notes that it is well-established Commission policy that channels of the same class are presumed to be equivalent for allotment purposes and that alternate channels may be allotted in response to counterproposals, citing *Churubusco, Huntington, Roanoke and South Whitley, Indiana,* 5 FCC Rcd 916 (1990) and the Appendix to Notices of Proposed Rule Making.

6. KDC also disputes Sauber's reliance on *Sandy Springs, supra,* for the proposition that the Fairview proposal does not represent a first local service but rather another service to Erie. KDC states that the type of evidence considered in determining whether Sandy Springs should be given a first local service preference was in connection with the petitioner's request for a change in an existing station's community of license. Here, the request is for a new local service, not a change of community for an existing service. In support, KDC cites *Remington and Falmouth, Virginia,* 8 FCC Rcd 6627 (1993), where the Commission rejected an attempt to rely on a change of community analysis in a new community proceeding.

7. KDC states that the appropriate analysis of the competing requests must be based on the allotment priorities set forth in *Revision of FM Assignment Policies and Procedures,* 90 FCC 2d 88 (1982), which are: (1) first fulltime aural service; (2) second fulltime aural service; (3) first local service; and (4) other public interest matters. In this case, KDC points out that none of the proposals purport to provide either a first or second aural service but each proposes a first local service to their respective communities. Therefore, it submits that the Commission must make a determination based upon factors relevant to the fourth priority. Under this priority, KDC submits that the most important factor is population. KDC recognizes that North Kingsville has a larger population than Fairview and that Cambridge Springs is smaller than the other two communities. However, it contends that Fairview is the only community which has gained population, approximately 8%, between 1980 and 1990. Conversely, the population of Cambridge Springs decreased almost 13% and the population of North Kingsville declined 9% during the same time period. KDC states that each of the communities receive a commensurate amount of services, noting that Cambridge Springs is located only twenty miles from downtown Erie and also receives service from stations licensed to the nearby communities of Meadville, Edinboro and Saegertown. As to North Kingsville, KDC states that the community receives service from the three stations licensed to Ashtabula, Ohio, and the two stations licensed to Conneaut, Ohio. Finally, KDC disputes the allegations that Fairview is not a community in its own right but is merely a suburb of Erie. It states that Fairview was founded in 1792 and incorporated in 1868. The community has its own local government, police and fire departments, public schools, numerous retail and professional businesses and the Fairview Business Association. In addition, it has its own churches, senior center, American Legion post and historical museum.

8. Sauber, in reply comments, agrees that a comparison of the communities need not be made since each of the communities can receive an allotment. He supports the allotment of Channel 241A to North Kingsville and Channel 230A to Fairview. This allotment scheme would permit the allotment of Channel 298A to Cambridge Springs. Sauber notes that KDC has previously suggested that Channel 283A be allotted to Cambridge Springs.[5] However, he argues that the public interest would be better served by allotting Channel 298A to Cambridge Springs and Channel 230A to Fairview. He states that Channel 298A at Fairview requires the use of a directional antenna where Channel 230A does not. He claims that a directional antenna costs is not only more expensive (about $6,000.00) than a nondirectional antenna but also substantially reduces the ability of the station's signal to penetrate buildings because of the reduction in effective radiated power. In supporting the allotment of Channel 230A to Fairview, Sauber discounts KDC's allegations about "ducting", pointing out that the Commission has traditionally rejected such considerations since it would virtually eliminate allotments to communities located along water paths. [6]

9. NKB opposes the allotment of Channel 241A to North Kingsville, contending that it is inferior to Channel 298A. NKB states that Channel 298A does not require the use of a directional antenna if operated as a 6 kW Class A facility. However, Channel 241A would be short-spaced by 7.3 kilometers to Station CFPL-FM, Channel 240C1, London, Ontario, Canada. NKB recognizes that Canada may agree to the allotment of Channel 241A as a specially negotiated allotment. However, it reiterates its contention that Channel 241A would be an inefficient and inferior allotment because of the short-spacing to Canadian Station CFPL-FM. It claims that this position is buttressed by past Commission pronouncements on the propagation of signals over water, citing *Bay Shore, New York,* 50 FR 10768 (1985), *recons. denied,* 59 RR 2d 1652 (1986) (where signal path is primarily over water the Commission's normal prediction method would not adequately reflect the signal strength).

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[5] Sauber faults KDC for failing to include a preclusion study addressing where other first local transmission services would be precluded if Channel 283A were allotted to Cambridge. However, such a preclusion study is no longer required to be submitted with petitions for rule making. *See Revision of FM Assignment Policies and Procedures,* 90 FCC 2d 88, 93 (1982).

[6] Ducting is a phenomenon caused by atmospheric conditions that enhance the propagation of signals most often occurring along paths over or near large bodies of water.

In this case, the signal path between North Kingsville and London, Ontario, is almost entirely over Lake Erie and the area along the north shore area of Ohio which would be served by the North Kingsville station would likely receive a much stronger signal from Canadian Station CFPL-FM than predicted by the Commission's propagation model, thus resulting in substantial interference with the North Kingsville station. NKB states that the area has a history of enhanced propagation due to ducting during certain times of the year. Therefore, NKB states that if Channel 241A is allotted to North Kingsville it will not apply for the channel.

10. KDC opposes the allotment of Channel 230A to Fairview because of the short-spacing to Station CKLW-FM, Channel 230C1, Windsor, Ontario, Canada. While acknowledging that Channel 298A at Fairview would be short-spaced to a co-channel allotment at Welland, Ontario, KDC argues that the two situations are not the same. First, the Welland allotment at this time is vacant, and secondly, the channel is allotted as a Class A. If Channel 230A is allotted to Fairview, the short-spacing would be to the co-channel Class C1 allotment being used by Station CKLW-FM, Windsor, Ontario, which operates with 100 kW power and has a long over-water propagation path. Therefore, it urges that Channel 298A be allotted to Fairview, Channel 241A to North Kingsville and Channel 283A to Cambridge Springs.

DISCUSSION

11. After careful review of the pleadings, we believe that each of the communities is deserving of a first local FM transmission service. Further, we find that a comparison of the communities is not necessary since an alternate channel is available for each. Therefore, we will allot Channel 298A to North Kingsville, Channel 283A to Cambridge Springs and Channel 230A to Fairview.

12. We recognize that both NKB and KDC oppose the allotment of the alternate channels proposed for their community because the short-spacing to the Canadian allotment will be to an operating Class C1 station and not to an unused Class A channel at Welland, thus raising the spectre of greater interference than predicted because of enhanced over-water propagation. While the Commission does not take such "enhanced over-water propagation" or "ducting" claims into consideration in allotment proceedings, Channel 298A cannot be allotted to both North Kingsville and Fairview and thus a choice as to which community will be allotted Channel 298A must be made. *See San Clemente, California*, 50 FR 8226, March 1, 1985, *rev. denied*, 2 FCC Rcd 2514 (1987) and *Ventura, California*, 2 FCC Rcd 5882 (1987), *recon.* 7 FCC Rcd 5601 (1992). We have based our decision to allot Channel 298A to North Kingsville on several factors. First, North Kingsville is the more populous community, with a 1990 Census population of 2,672 persons versus a 1990 Census population of 1,988 persons at Fairview. Secondly, North Kingsville receives only four FM services while Fairview receives seven.[7] As to the allotment at Cambridge Springs, Sauber states that both Channel 298A and Channel 283A can be used but expresses a preference for Channel 298A. However, this preference is based on the unsupported statement that Channel 298A provides the most flexibility in choosing transmitter site locations. We find that this statement does not provide a justification for the allotment of Channel 298A instead of Channel 283A. Finally, we note that while all of the allotments require the concurrence of the Canadian government as specially negotiated short-spaced allotments, this is because 6 kW Class A allotments are considered as Class B1's for notification purposes pursuant to the U.S.-Canadian Agreement. In actuality, all of the channels proposed for allotment herein can be operated with the full 6 kW of power without the need to directionalize to protect the Canadian stations.

Technical Summary

13. Channel 230A can be allotted to Fairview and Channel 298A can be allotted to North Kingsville in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction. Channel 283A can be allotted to Cambridge Springs in compliance with the Commission's minimum distance separation requirements with a site restriction of 0.4 kilometers (0.3 miles) east.[8] Canadian concurrence in each of these allotments as specially negotiated short-spaced allotments has been received since all of the communities are located within 320 kilometers (200 miles) of the U.S.-Canadian border.

14. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 10, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
North Kingsville, Ohio	298A
Cambridge Springs, Pennsylvania	283A
Fairview, Pennsylvania	230A

15. The window period for filing applications will open on **April 10, 1995**, and close on **May 11, 1995**.

16. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

17. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 418-2180.

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[7] While not of decisional significance, we note that North Kingsville also has a greater short-spacing than Fairview. Channel 241A at North Kingsville would be 46 kilometers short-spaced to Station CFPL-FM, Channel 240C1, London, Ontario, while Channel 230A at Fairview would be 29 kilometers short-spaced to Station CKLW-FM, Channel 230C1, Windsor, Ontario.

[8] The coordinates for Channel 298A at North Kingsville are North Latitude 41-54-18 and West Longitude 80-41-36. The coordinates for Channel 230A at Fairview are 42-01-48; 80-15-12. The coordinates for Channel 283A at Cambridge Springs are 41-48-13; 80-03-24.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-27

In the Matter of

Amendment of Section 73.202(b), RM-8582
Table of Allotments,
FM Broadcast Stations.
(Yazoo City, Mississippi)

NOTICE OF PROPOSED RULE MAKING

Adopted: February 9, 1995; Released: February 23, 1995

Comment Date: April 17, 1995
Reply Comment Date: May 2, 1995

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Mississippi College ("petitioner"), licensee of Station WHJT(FM), Channel 228A, Clinton, Mississippi, seeking the deletion of vacant Channel 229A at Yazoo City, Mississippi.

2. In support of its proposal, petitioner states that the deletion of Channel 229A at Yazoo City would enable Station WHJT(FM) to increase its power to the maximum permitted for a Class A station, thereby improving petitioner's service to the public. Furthermore, petitioner states that Dri-Two, Inc.'s construction permit for Station WAZF(FM), Channel 229A, Yazoo City, was cancelled and the channel has been vacant since July 1993.[1] Petitioner contends that deleting the channel at Yazoo City would cause no loss of service since Yazoo City is presently served by Station WJNS(FM), as well as an AM station, WAZF(AM). Further, petitioner argues that deletion of Channel 229A will eliminate two short-spaced allotments, thus serving the public interest.

3. We believe the public interest would be served by the deletion of Channel 229A at Yazoo City, since it could enable Station WHJT(FM) to increase its power.[2] However, we note that the Commission does not delete a channel in which interest has been expressed. Therefore, should the Commission receive an expression of interest by the initial comment deadline specified herein for Channel 229A at Yazoo City, Mississippi, petitioner's proposal to delete Channel 229A at Yazoo City may be dismissed.

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Yazoo City, Mississippi	221C3, 229A	221C3

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **April 17, 1995**, and reply comments on or before **May 2, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Shaun A. Maher
Smithwick & Belendiuk, P.C.
1990 M Street, N.W. Suite 510
Washington, D.C. 20036
(Counsel for petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Pam Blumenthal, Mass Media Bureau, (202)418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a

[1] Review of Commission's records indicate that Station WAZF(FM)'s construction permit was forfeited and its call sign was cancelled on April 4, 1991. Dri-Two, Inc., permittee of Station WAZF(FM) filed a petition for reconsideration on June 12, 1991. The Commission denied Dri-Two's petition on July 2, 1993, thus affirming the cancellation of WAZF(FM)'s construction permit.

[2] In order to increase power, petitioner also proposes to change its transmitter site for Station WHJT(FM). The proposed coordinates for Channel 228A at Clinton, Mississippi, are North Latitude 32-23-55 and West Longitude 90-20-05. In addition, this proposal is contingent upon Station WVIV(FM) at Pearl, Mississippi, receiving a license to operate on Channel 230C3 pursuant to its one-step application (BMPH-941212IL). Therefore, we may not finalize this proceeding until the Pearl station is license at the site specified in its application.

request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1),303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

The Conspiracy FOIA Control No. 94-160

On Request for
Inspection of Records

MEMORANDUM OPINION AND ORDER

Adopted: January 12, 1995; Released: January 13, 1995

By the Commission:

1. The Commission has under consideration an Application for Review filed by *The Conspiracy*, the newspaper of the San Francisco-Bay Area Chapter of the National Lawyers Guild. The appeal seeks review of an initial ruling made by the former Field Operations Bureau (FOB),[1] concerning the denial of *The Conspiracy*'s Freedom of Information Act (FOIA) request. 5 U.S.C. § 552. Letter from Beverly G. Baker, Chief, FOB, to Betsy Johnson, Editor, *The Conspiracy* (October 14, 1994).[2] The request relates to unauthorized broadcasts, in 1993, by Stephen Paul Dunifer in the vicinity of Berkeley, California.

I. BACKGROUND

2. In April 1993, the FOB's San Francisco office received information from two individuals indicating that an unauthorized FM radio transmitter was operating on 88.1 MHz in the San Francisco Bay area. Declaration of Philip M. Kane (Kane) at ¶ 9.[3] A subsequent investigation spanning several months in 1993 and 1994 by FOB engineers, involving the use of electronic radio direction-finding equipment and other techniques, disclosed that Dunifer was engaging in unauthorized radio operations in violation of Section 301 of the Communications Act of 1934, as amended, 47 U.S.C. § 301. The radio transmissions were on 88.1 MHz, a frequency set aside for non-commercial educational FM broadcast stations. Additionally, non-licensed, low-power transmitters may use that frequency provided that they comply with certain technical specifications. *See* 47 C.F.R. § 15.239(b). The FOB investigation determined that Dunifer's radio operations exceeded the authorized field strengths for non-licensed transmissions. Moreover, Dunifer's operations were observed to cause interference to radio stations KQED-FM, San Francisco, California, and KECG(FM), El Cerrito, California. Declaration of David K. Hartshorn at ¶ 15; Declaration of William R. Zears, Jr. at ¶ 13; Kane Declaration at ¶ 24.

3. The FOB, acting pursuant to Section 503(b) of the Communications Act, 47 U.S.C. § 503(b), imposed a $20,000 forfeiture against Dunifer on November 8, 1993 for two unlicensed broadcasts occurring on April 25 and May 2, 1993. *Stephen Paul Dunifer*, NAL/Acct. No. 315SF0050 (FOB Nov. 8, 1993), application for review pending.

4. On October 6, 1994, the United States brought suit under Section 401(a) of the Communications Act, 47 U.S.C. § 401(a), against Dunifer in the United States District Court for the Northern District of California. That suit seeks injunctive and declaratory relief and is based on 24 separate and unauthorized broadcasts occurring from April 25, 1993 to May 8, 1994. *United States v. Dunifer*, No. C94 3542 CW (*see* n.3 above).

II. FOIA REQUEST

4. *The Conspiracy*'s FOIA request, filed on May 19, 1994, noted an August 1993 newspaper article in which Philip M. Kane, the Engineer in Charge of the FOB's San Francisco office, was attributed with the claim that his office had received complaints from "several" licensed stations. *Express*, Aug. 13, 1993 at 14. The FOIA request asked the Commission "to inform us of:" the details regarding these complaints, which stations filed them, the dates of the complaints, the nature of the complaints, and the FCC's response to them.[4]

5. In its October 14, 1994 letter ruling, the Bureau responded that several informal inquiries or complaints, regarding why stronger action had not been taken against Dunifer, had been received from local broadcast engineer and consultant sources. The FOB explained that the complaints and inquiries were made in person or by telephone and that no documents or other records were compiled regarding such communications. Additionally, the FOB noted that the individuals responsible for the inquiries and complaints had expressly requested confidentiality. Thus, the FOB found that, even if records of these complaints did exist, the identities of the individuals were exempt from mandatory disclosure under 5 U.S.C. § 552(b)(7)(D) and 47 C.F.R. § 0.457(g)(4).

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[1] As a result of Commission reorganization, the Bureau's activities have been assumed by the new Compliance and Information Bureau (CIB).

[2] While the requester's appeal is technically not timely and does not conform to the Commission's procedural rules for appealing the denial of an FOIA request, *see* 47 C.F.R. § 0.461(i), it does appear that there were administrative difficulties in the delivery of the Bureau's initial FOIA response. Therefore, and under these particular circumstances, we will treat *The Conspiracy*'s late filed letter pleading as an application for review and consider its merits.

[3] The sworn declaration executed by Kane, the Engineer in Charge of the FOB's San Francisco office, and declarations made by other FOB personnel were filed by the United States in support of its complaint for declaratory and injunctive relief against Dunifer in *United States v. Stephen Paul Dunifer*, No. C94 3542 CW (N.D. Cal., docketed October 6, 1994). A hearing in that case is scheduled for January 20, 1995.

[4] FOIA requires federal agencies to make public their records except for those falling within specified exemptions. It does not, however, require agencies to answer what are in effect interrogatories. *DiViaio v. Kelley*, 571 F.2d 538, 542-43 (10th Cir. 1978); *Hudgins v. IRS*, 620 F. Supp. 19, 21 (D.D.C. 1985). Nor does FOIA require agencies to create paper or other records for the requester's benefit. *See, e.g., Krohn v. Department of Justice*, 628 F.2d 195, 197-98 (D.C. Cir. 1980). 6

III. APPLICATION FOR REVIEW

6. *The Conspiracy* challenges the FOB's claim that no records of these inquiries and complaints exist. *The Conspiracy* assumes that records of these complaints would routinely have been kept. Moreover, *The Conspiracy* asserts that because its request sought information concerning the Commission's response to citizen complaints, the Commission should have disclosed all information concerning the monitoring of Dunifer's operations. *The Conspiracy* suggests that such documentation should include field notes of Commission investigators and records compiled by the Commission respecting Dunifer's Internet postings publicizing his operations.

7. Additionally, *The Conspiracy* contends that the Commission waived the confidentiality of any alleged complaints by stations KQED-FM and KECG(FM) because they appear to have been mentioned in a newspaper article which reported an interview of FCC counsel concerning the pending district court litigation.

8. *The Conspiracy* further requests that, if its application for review is denied pursuant to 47 C.F.R. 0.461(i), it should be treated as a new FOIA request covering all materials in the Commission's possession regarding Dunifer's broadcasts and activities.

IV. DISCUSSION

9. We will deny *The Conspiracy* 's application for review. *The Conspiracy* has shown no basis to believe that, contrary to the express representations of Commission staff, any record was made or ever existed reflecting the informal inquiries and complaints referred to in *The Conspiracy*'s FOIA request. We have no reason to believe that these informal contacts were of a type that would have been recorded in the ordinary course of business. In fact, the public inquiries seem to be duplicative and, therefore, redundant of information already received and compiled by the Commission.

10. As the sworn declarations indicate, the FOB initiated its investigation of Dunifer's illegal broadcasts after receiving information from two individuals in April 1993. Information, indicating numerous and ongoing violations of the Communications Act by Dunifer, was developed by FOB investigators during the course of their investigation. Thus, there is no reason to infer that the inquiries and complaints referred to by *The Conspiracy* had any singular significance that would have warranted making a public record of them, especially since those making the contacts wished to remain anonymous and the information furnished tracked the intelligence already gathered by the staff.

11. Similarly, because the inquiries and complaints referred to by *The Conspiracy* did not give rise to or precipitate the investigation of Dunifer, the investigation therefore was not a "response" to these inquiries and the materials developed during the investigation, *e.g.*, notes and memoranda of FCC engineers investigating Dunifer's illegal broadcasts, were not within the scope of the FOIA request. In this regard, we do not adopt *The Conspiracy*'s overly literal interpretation of the FOB's statement that: "the San Francisco Field Office response was to continue to schedule field enforcement work to gather probative evidence of any Communications Act violations involving Mr. Dunifer." Letter from Baker to Johnson at 1. We read the Bureau's letter to mean that it made no specific response to the public contacts but merely continued its ongoing investigation.

12. Moreover, there is no support for *The Conspiracy* 's contention that the Commission indicated that stations KQED-FM and KECG(FM) were the complainants and that the Commission thereby waived the confidentiality of their identities. The sworn declarations further indicate that interference to these stations was observed by the FOB investigators, not that the stations had made the complaints. Paragraph 2, *supra*. The interference to KECG(FM) was observed by an FCC engineer on January 16, 1994, and thus could not have been the subject of the August 1993 newspaper article. See ¶ 4 above. To the extent that the newspaper article relied on by *The Conspiracy* suggests that KECG(FM) was one of the complainants to the Commission, the article is inconsistent with the declarations to which it refers. *San Francisco Daily Journal*, Nov. 28, 1994.

13. Although we find that the Bureau was entirely justified in its response to *The Conspiracy* 's request, we note that *The Conspiracy* has clarified the scope of the records it now seeks in its application for review. In this connection, however, we believe that it would best conduce to efficient administration of the public's business for *The Conspiracy* to file a new request covering any material outside the scope of its original request.

V. ORDER

14. In view of the reasons explained above, IT IS ORDERED, That the Application for Review, filed on December 14, 1994, by *The Conspiracy* IS DENIED. The Requester may seek judicial review of this decision pursuant to 5 U.S.C. §552(a)(4)(B).

15. The Officials responsible for this action are the following Commissioners: Reed E. Hundt, Chairman, James H. Quello, Andrew C. Barrett, Rachelle B. Chong, and Susan Ness.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 94-89

In the Matter of

Elehue Kawika Freemon and Lucille K. Freemon,
Complainants,

v.

American Telephone and Telegraph Company
Defendant

FILE NO. E-90-393

APPEARANCES

Elehue K. Freemon Pro Se; Peter H. Jacoby and *Clifford K. Williams* on behalf of AT&T; and *Keith Nichols* on behalf of the Federal Communication Commission's Common Carrier Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE WALTER C. MILLER

Issued: February 17, 1995; Released: February 24, 1995

1. On August 16, 1990, Elehue Kawika Freemon and ostensibly his mother, Lucille K. Freemon, filed a *formal* complaint against AT&T.[1] They asked:

> ". . . for a formal investigations (sic) by the Federal Communications Commission (FCC) to redress and to assist in remedies for the act of divulgence and interception/electronic eavesdropping, alteration of [Lucille Freemon's] monthly telephone bill/toll and false/arbitrary accusations by an AT&T long-distance operator and AT&T under AT&T company directives causing great harm and injury to complainants on May 30, 1988. . ."

2. Based on allegations contained in the formal complaint, the Freemons posited the following damage claims:

> "For the loss of his[2] Business and retirement funds the sum of one point two million dollars ($1.2 million dollars) is requested.
>
> "for the extreme trauma caused a sum of two million dollars ($2.0 million dollars) is requested."[3]

3. AT&T answered the Freemons' complaint on September 24, 1990. They contended that AT&T and their operator (Nancy Zolnikov) hadn't violated any statute or other law; that Mrs. Zolnikov did not monitor complainants' telephone conversation of May 30, 1988; and that complainants have not shown that AT&T caused them any injury.

4. The Freemons replied to AT&T's answer on October 18, 1990.[4] There they argued in part as follows:

> ". . .
>
> In the foregoing reply the foreword (c) will assist the commission (sic) in guiding through the varies (sic) AT&T Answers (AT&T Ans.) due to the numberous (sic) violations of 47 CFR 1.724(b), (c) and controdictions (sic) in which complaintants (sic) have substain (sic) stronger allegations against AT&T.
>
> "It, (C), will consolidate. . . other statues (sic) which intern (sic) complaintants (sic) have suffered. References to the U.S., Constitution (sic). . ."[5]

5. Four years after the official complaint was filed, the Commission designated the matter for hearing. See FCC 94-192 released August 14, 1994. They set down the following six issues:

> (1) To determine the facts and circumstances surrounding AT&T's handling of Elehue Freemon's operator-assisted telephone call to his mother, Lucille Freemon, on May 30, 1988.[6]

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[1] Actually the Freemons filed an *informal* complaint against AT&T on February 9, 1989. That informal complaint was terminated on January 4, 1991. See FCC 94-192, released August 12, 1994 at Footnote 5.

[2] "his" refers to complainant Elehue Kawika Freemon.

[3] Elehue K. Freemon never offered a scintilla of evidence to prove his damage claims. He offered nothing to prove his "Business" funds; he offered nothing to prove "retirement funds." According to this record Elehue Freemon had no "retirement funds" to lose. Freemon's use of such phrases is sheer dissembling. It illustrates the type of exaggeration he has used throughout this case.

[4] However, the Freemons never identified and offered their October 18, 1990 reply into evidence. So the Reply has never been made a part of the evidentiary record in this case. However, AT&T has had official notice taken of the Reply. See Tr.115; and AT&T Ex.9.

[5] Grasping Elehue Freemon's position in this case has been almost impossible. It's incredible how the Common Carrier Bureau could analyze all the misdates, the misstatements, and the misspellings and still designate the matter for hearing. Admittedly one can read a particular section of an Elehue Freemon pleading and *guess* at what he said. But resolving a $3.2 million damage claim calls for accuracy and conciseness, not guesswork. Moreover, many of the crucial misspellings; i.e., misspellings of words that form the premise of the claim, appear deliberate. This is true when you consider Elehue Freemon's contention that he has completed two years of college. See Judges Ex.3, pp.27-30; Tr.74-82 and Tr.249.

[6] Actually Elehue Freemon made at least three operator-assisted telephone calls to his mother on May 30, 1988. The call referred to in this issue was made around 10:30 or 10:40 p.m. on that day.

(2) To determine whether a telephone conversation ensued between Elehue Freemon and Lucille Freemon on May 30, 1988, at the time an AT&T operator handled the operator-assisted call at issue.

(3) To determine whether, AT&T, through its operator or otherwise, intercepted and disclosed the contents or meaning of any telephone conversation that may have taken place between Elehue Freemon on May 30, 1988, within the meaning of Section 705 of the Communications Act.

(4) To determine, in light of the evidence adduced under issues 1 through 3 above, whether AT&T's actions in handling Elehue Freemon's May 30, 1988 operator-assisted call violated Section 705 of the Communications Act.[7]

(5) To determine, in view of the evidence adduced on the foregoing issues, whether and if so, in what amounts, AT&T should be required to pay monetary damages to complaints.

(6) To determine, in view of the evidence adduced on the foregoing issues, whether complainants are entitled to an award of prejudgment interest on any damages recovered in this proceeding.

6. The Commission placed both the burden of proceeding and the burden of proof on all six issues on Elehue Kawika Freemon and Lucille K. Freemon, complainants. See FCC 94-192 *supra.* at para.12.

7. The Commission further indicated ". . . that the designated parties may avail themselves of an opportunity to be heard by filing with the Commission a Notice of Appearance in accordance with Section 1.221 of the Rules, 47 CFR § 1.221, within twenty (20) days of the mailing of this Order." See FCC 94-192 *supra.* at para.13.

8. AT&T and Elehue K. Freemon filed timely Notices of Appearance on September 1, 1994. Complainant Lucille K. Freemon *purportedly* filed a Notice of Appearance the same day. That Notice will be discussed under "Threshold Rulings" *infra.* The Common Carrier Bureau filed a "Limited Notice of Appearance." There they indicated that they would not actively participate in this case, but would limit their efforts to monitoring the case.

9. We held the Prehearing Conference on November 10, 1994, the Evidentiary Admission Session on November 28, 1994, and the Hearing on December 12, 1994. The evidentiary record was closed December 12, 1994. See Tr.411 and FCC 94M-644 released December 15, 1994.

10. Elehue K. Freemon and AT&T filed their Proposed Findings of Fact and Conclusions of Law on January 30, 1995. AT&T also filed a Memorandum in support of Proposed Conclusions of Law. AT&T by letter dated February 8, 1995, indicated that they did not intend to file Reply Findings and Conclusions. But see FCC 95M-46 released February 10, 1995. Elehue Freemon filed Reply findings on February 15, 1995. The Common Carrier Bureau filed nothing. See Finding 8 *supra.*

Threshold Rulings

11. The case will turn on two pivotal rulings *infra.*[8] The basic documentation on which the proceeding is based; i.e., the August 16, 1990, formal complaint (See Finding 1 *supra.*) has been falsely filed. Elehue Freemon, the filer, has attempted to hoodwink the Commission into issuing a damage award under false pretenses. Since the basic complaint is counterfeit, it cannot and should not be given serious consideration. So it will be dismissed.

Lucille K. Freemon's Complaint

12. First, those portions of the August 16, 1990 complaint that can be attributed to Lucille Freemon will be dismissed.[9] This record shows that she did not bring and has never intended to bring a complaint against AT&T. Back in 1988 she was aware that her son, Elehue K. Freemon had a dispute with several different entities[10] (including AT&T) that stemmed from an incident that occurred on the evening of May 30, 1988. But she believed that his dispute with AT&T had ended long ago. See Judges Ex.1, pp.33, 35, 54-55, 65-66, and 74.

13. She never entered an appearance in this case. Rather her son Elehue forged her signature on a Notice of Appearance and filed it with the Commission (See Tr.5-6; FCC 94M-529 released September 16, 1994; and Judges Ex.3, p.281).

14. When that forgery was exposed, Elehue Freemon then tried to file a power of attorney with the Commission that would permit him to represent his mother in this case. That also failed. FCC 94M-584, released October 21, 1994.

15. AT&T then took Lucille Freemon's deposition in Long Beach, California on October 4, 1994. There she indicated that she wasn't and never had been a party to her son's dispute against AT&T.[11] In fact, her version of what happened on the night of May 30, 1988, more nearly coincides with AT&T's (Nancy Zolnikov's) version, and differs substantially from what her son Elehue K. Freemon claims happened. Compare Judges Ex.1, pp.67-75 with AT&T Exhibit 8, paras.26-31 and attached verification.

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[7] Section 705(a) states in pertinent part: "Except as authorized by Chapter 119, Title 18, United States code, no person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof."

[8] However, findings of fact will also be made on designated issues 1-6, and the burdens of proceeding and proof designated by the Commission. See paras.5-6 *supra.*

[9] It is difficult to separate Elehue Freemon's own allegations from those he attributes to his mother. Actually all of the allegations contained in Lucille Freemon's affidavit of February 9, 1989 (See Freemon Ex.1, p.12) are his. He prepared the affidavit, and ostensibly she signed it. None of the allegations are really hers.

[10] These entities include: (1) the Gresham Oregon Emergency Service; (2) the Gresham Police Department; (3) the Portland Adventist Hospital; and (4) Dr. Theodore P. Utt, M.D.

[11] Mrs. Freemon has even carried her point of non-involvement to refusing to sign her October 4, 1994 deposition. See Tr.9.

16. Since Lucille Freemon is not now and never has been a party to this case, any allegations attributable to her or any damage claims traceable to her will be dismissed.[12]

Elehue Freemon's Complaint

17. Secondly, those portions of the August 16, 1990 formal complaint that can be attributed to Elehue Freemon will also be dismissed. Elehue Freemon has filed a sham suit against AT&T.[13] From the very outset he has held out his mother as a co-complainant, knowing all along she was not involved in the least.

18. Elehue Freemon obviously believed that his chances of receiving a favorable cash damage award from the FCC would be enhanced if a Black female were one of the complainants. He also wanted to obtain all the tactical and procedural advantages that would accrue from having his mother join in the suit. So he deliberately and dishonestly included her in his complaint that he filed with the Commission.

19. Moreover, during the four years the formal complaint was being processed Elehue Freemon never admitted, never even hinted that his mother was not really a co-complainant or that she didn't even know her son had a damage claim against AT&T. In fact, he continued to represent to the authorities (the Common Carrier Bureau) that his mother had been damaged by the acts of the AT&T operator, Nancy Zolnikov, on the evening of May 30, 1988.

20. Later Elehue Freemon realized that using his mother as a front was not going to produce the lucrative dollar amounts he had asked for (See para. 2 *supra*.). So, on May 12, 1991, Freemon sent AT&T a threatening letter.[14] See Judges Ex. 2, sub-exhibit 41; Tr. 209, 215, and 217-218. That letter reads in part:[15]

> ". . .
>
> Due to the problems this has caused to my family and your eagerness to continue this case I've decided to go public with this issue!
>
> . . .
>
> As the 'Roney (sic) King' Civil Rights case in California has brought out the publics (sic) opinion must be included since it will affect all Americans.
>
> The PUBLIC NEEDS TO KNOW, what ever (sic) the outcome may be, what kind of company AT&T is really about. . . .
>
> Trust AT&T?"

21. Elehue Freemon followed through on his threat. On May 16, 1991, Elehue and Lucille Freemon filed for "Discovery Through the Use of Public Opinion." See AT&T Ex.10, and Tr.135-138. The Commission ultimately denied that motion. See FCC 94-192, released August 12, 1994 at para.15.

22. After it was discovered that Elehue Freemon had forged his mother's signature on her purported Notice of Appearance (Finding 13 *supra.*), he realized that his mother wasn't going to give him the tactical and procedural leverage he thought she would. And when AT&T announced that it was going to depose Lucille Freemon (Finding 15 *supra.*), Elehue Freemon recognized that his mother would end up being a litigation liability, not an asset. It was then he brought up the idea that his mother had Alzheimer's disease (Tr.6-7), and that therefore her testimony couldn't be trusted. Mr. Freemon's belated effort to impeach his mother and fellow co-complainant was rejected (Tr.314-341).

23. Since both Lucille K. Freemon's and Elehue Kawika Freemon's basic allegations are subject to dismissal (Findings 12-22 *supra.*), the sham suit (File No. E-90-393) they have brought against AT&T will be dismissed.[16]

The Burdens of Proceeding and Burdens of Proof

24. *Assuming* that the complaint was not a sham, it would still have to be denied. As previously noted (Finding 6 *supra*), the Commission placed both the burden of proceeding and the burden of proof on all six issues on the Freemons. Not only have they failed to meet their burdens, they have not seriously tried to meet those burdens.[17]

25. During the predesignation phase of this case; i.e., between August 16, 1990 and August 12, 1994, Elehue Freemon filed at least 20 pleadings with the Commission. Yet when he was called upon to meet his burdens, he only introduced four documents: (1) Freemon Exhibit 1: the official August 16, 1990 formal complaint; (2) Freemon Exhibit 2: "Complainants Motion to Accept Paragraph 21(b) and supporting discussions and paragraph 24 correc-

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[12] There are some mothers who allow their children to take advantage of them. Although Lucille Freemon comes through as a basically honest and decent person, when one reads her deposition (Judges' Exhibit 1) it becomes apparent that she never realized how much her son was using and abusing her.

[13] This is by far the largest damage claim Mr. Freemon has ever filed. But he is not a stranger to damage-claim litigation. On two separate occasions he has sued: (1) the Security Pacific Bank; and (2) EDD, the unemployment agency for the State of California.

[14] Elehue Freemon admits that the letter can be classified as a threatening letter (Tr.217-218). Even while his claim was being processed as an informal complaint (Footnote 1 *supra.*), Mr. Freemon told AT&T manager, Michael Kmetz, that if he filed a lawsuit against AT&T, this matter "would become a big item in the press." See Judge's Ex. 1, p.72.

[15] The letter bears the date "May 12, 1993." As is the case for numerous dates Elehue Freemon wants the Commission to rely on, the date is inaccurate. The Trial Judge believes the correct date to be "May 12, 1991."

[16] Of course AT&T probably could have paid Elehue Freemon nuisance-value money and settled the case. That has become the standard corporate practice. But in this instance, the Trial Judge informally suggested to AT&T counsel that the Company, the Commission, and the Public would all be better off if the case were not settled. Sham litigators shouldn't be encouraged, even a little bit. This dishonest and deceitful practice cannot be stamped out. But it certainly can't be allowed to spread.

[17] Elehue Freemon is a *pro se* litigant. He has demonstrated that he is not capable of even addressing his assigned burdens, let alone proving them. The Freemons were admonished on numerous occasions that they would need to obtain counsel. See e.g. FCC 94M-479 released August 17, 1994; FCC 94M-481 released August 19, 1994 at Footnote 4; FCC 94M-550 released

tion to Late Pleading Reply'";[18] (3) Freemon Exhibit 3: "Complainants Motion to Accept Evidence supporting complainants telephone conversation on May 30, 1991 at 22:30 :00 ";[19] and Freemon Ex.4: Medical patient records of Elehue K. Freemon for the period 5-31-88 through 6-3-88.[20]

26. Moreover, the Trial Judge was forced to reject three of those four exhibits; i.e., Freemon Exs. 2, 3, and 4. See Tr. 91, 106, and 112. So Elehue Freemon fell woefully short of meeting any of his burdens on the six issues he faced. So even if the Freemons' complaint couldn't be dismissed (but see Findings 12-23 *supra*.), it would have to be summarily denied.

Findings of Fact: Issues 1-4

27. Based on the foregoing (Findings 1-26 *supra*), no substantive findings of fact are needed. But AT&T has taken the positiony that this matter should be decided on the merits; i.e., that a merits judgment is the best way of disposing of this lengthy litigation (Tr.14-19).

28. Given the six year length of the predesignation phase (both formal and informal) and the cost and labor associated with that phase, one can engender sympathy for the telephone company's position. After six years of jousting something probably should be said about the merits of the proceeding. So *assuming* the case had to be tried on the substantive merits, the following facts on Issues 1-4 would be appropriate.[21]

29. On May 30, 1988 at about 10:30 p.m. Elehue Freemon tried to place a long distance collect call from his home in Gresham, Oregon, to his mother in Long Beach, California. Before he tried to place that call, Mr. Freemon had consumed at least three glasses of wine and an indeterminate number of sleeping pills. See Judge's Exhibit 1, pp. 4-125, 174-175, 183, 189, 194 and 197.

30. Elehue Freemon was connected to an AT&T long distance operator, Nancy Zolnikov. When he was so connected and began speaking to her, he was breathing heavily, and his speech was confused and disoriented. See AT&T Ex.7 (Complaint, p.2); AT&T Exhibit 8, p.7; Judges Ex.1, pp. 179, 202; and Judges Ex. 3, p. 23.

31. Initially Mr. Freemon couldn't state what service or assistance he needed from Ms. Zolnikov, stating only that he wanted to talk to "Mom." Ms. Zolnikov then asked Mr. Freemon for the telephone number that he wished to call; he gave her the 7-digit number 427-2438, but he couldn't give her the area code. Ms. Zolnikov than asked Freemon where his mother lived, thereby allowing her to determine that the call should be routed to Long Beach, California. See Judge's Ex.1, pp.191-192; and AT&T Ex. 8, p. 7.

32. Ms. Zolnikov then connected the call to complainant Lucille Freemon, and announced that Mr. Freemon was trying to place a collect call. Mr. Freemon never heard Ms. Zolnikov say anything after Ms. Zolnikov announced the call. When Zolnikov indicated to Lucille Freemon that Mr. Freemon appeared to need medical help, Mrs. Freemon gave Ms. Zolnikov Mr. Freemon's full name and expressly authorized Ms. Zolnikov to seek assistance for her son. See Judge's Ex. 1, pp. 199-200, 210; Ex. 2, pp. 71-73; Ex. 3, p. 23; AT&T Ex. 7, p.2, and Ex. 8, pp. 7-8.

33. Mrs. Freemon then dropped off, and Ms. Zolnikov routed the phone call to the Oregon Emergency Services (OES) in Portland, Oregon. She told them Mr. Freemon needed assistance. After they received the call, OES personnel independently determined to send police to Mr. Freemon's residence. See Judge's Ex.3, p.24, 41.

34. *Intermediate Findings.* Nancy Zolnikov did not violate 47 USC 705 on the night of May 30, 1988. She acted properly. When she forwarded the call to the OES, she was acting at the direction of, and with the permission of, Mrs. Lucille Freemon. Mrs. Lucille Freemon confirmed that fact at her October 4, 1994 deposition. See Judges Ex.1, pp.72-73. Operator Zelnikov did not surreptitiously monitor any telephone conversation between Elehue Freemon and his mother. She forwarded the call to the emergency agency as a necessary incident to the rendition of AT&T's service. There was no interception; there was no improper divulgence.

35. Designated issue 2 asks whether a telephone conversation ensued between Elehue Freemon and Lucille Freemon on May 30, 1988, at the time an AT&T operator handled the operator-assisted call. The answer is that there was no such conversation during the operator assisted call described in paras.29-33 *supra*.

36. This does not mean there were *no* telephone conversations between Elehue Freemon and Lucille Freemon on May 30, 1988. The evidentiary record shows that Elehue Freemon made at least two (2) other operator-assisted collect calls to his mother on May 30, 1988. He made his first collect call at 8:37 a.m., and the second at 6:40 p.m. Moreover, between May 23, 1988 and June 21, 1988, Elehue Freemon made at least 19 operator-assisted collect calls to his mother. See Tr.194-209, 225, and 275-282; also see Freemon Ex.3, rejected.

37. So even if we were to *assume* that Elehue Freemon were honest (which he isn't), and if we were to *assume* that he has tried to present an accurate version of a 10:30 p.m.

September 28, 1994 at para.5; FCC 94M-591 released October 26, 1994 at para.3; Tr.21-22; and Tr.175. They didn't do so. It's time to pay the penalty for going *pro se*.

[18] Why Freemon selected this particular pleading from the 20 he had available is a mystery. The certificate of service accompanying Freemon Ex.2 indicates that the pleading was served on the ". . .26th day of July 1991. . " Yet the body of the pleading refers to events that occurred on September 12 and 14, 1991.

[19] This document contains a number of critical errors. For instance it stresses an incident that occurred ". . . on May 30, 1991 at approximately 22:30:00." In addition, throughout this hearing both AT&T and Elehue Freemon have referred to the telephone call in question as having occurred at 10:30 or 10:40 p.m. Suddenly, without citation and without reason, Elehue Freemon now refers to the phone call in question as having occurred around 23:00 hours. See Freemon Proposed Findings 5, 9, 20, 29, 33, 40 and 72.

[20] Aside from the original complaint (Freemon Ex. 1), one can only guess why Freemon selected the documents he did. He didn't even identify and offer his "Reply" to AT&T's October 23, 1990 "Answer." See AT&T Exs. 8 and 9.

[21] The Issue 1-4 Findings of Fact are premised on AT&T Exs. C, E, 7 and 8; and Judges Exs. 1 and 3. Elehue Freemon, at the first page of his Findings, claims that he ". . . herewith presents and files eight proposed findings of fact and conclusion. . ." The Trial Judge has searched and searched. He cannot figure out what Mr. Freemon is saying; i.e., he simply cannot discern "eight" findings and conclusion.

May 30, 1988 telephone call between he and his mother (which he hasn't), there is still the distinct possibility that he has been describing the *wrong* telephone call.

38. Remember too, that on May 30, 1988, Elehue Freemon was drinking wine and taking sleeping pills. See Tr.202, and AT&T Ex.8 at subexhibit B (Police Report). So if it came to accepting Elehue Freemon's version of the 10:30 p.m. telephone call or accepting Nancy Zolnikov's version as corroborated by Lucille Freemon, the choice is clear. Elehue Freemon was simply not in the physical or mental condition to retain and later recall accurate first-hand testimony.

39. One further observation is worthwhile. When Nancy Zolnikov first received the 10:30 p.m. operator-assisted call from Elehue Freemon on the night of May 30, 1988, she came to believe that a medical emergency existed: Elehue Freemon didn't know his mother's area code, he was incoherent, and he was having trouble breathing. See Findings 29-33 *supra.*

40. Now it isn't necessary to a decision in this case that Mrs. Zolnikov's judgment be accurate. As long as she honestly believed that a medical emergency existed and as long as she acted in good faith, forwarding the call to the Oregon Emergency Agency was neither illegal nor improper. But the hard cold fact of life is that Mrs. Zolnikov's judgment was accurate. A medical emergency did exist. Elehue Freemon was contemplating suicide, and he did indeed need help. So when Nancy Zolnikov, with Lucille Freemon's permission, forwarded the call to the Gresham emergency medical authorities, she was not only doing the right thing, she was doing the best thing.

Findings of Facts: Issues 5-6

41. Since AT&T has not violated 47 USC 705, they are not required to pay any monetary damages to the complainants. And even *assuming* that a 705 violation had occurred, AT&T would not be required to pay any damages to complainants. Complainants have failed to meet their burden of proceeding and burden of proof under Issue 5. Indeed they have not even attempted to seriously address those burdens. See Findings 24-26 *supra.*

42. Similarly, under designated issue 6, and since complainants are not entitled to damages (See Finding 41 *supra.*), they are not entitled to any prejudgment interest.

Conclusions of Law

1. This is the unpleasant saga of a dishonest son attempting to use his mother to extort a large damage claim from a telephone company with deep pockets. The formal complaint (File No. E-90-393) that Elehue Kawika Freemon and his mother, Lucille Freemon filed on August 16, 1990 against AT&T Corp. will be dismissed. That complaint is a fake and a sham.

2. Lucille K. Freemon has never intended to bring an action against AT&T. She is not now and never has been a complainant in this case. For the four years that the Common Carrier Bureau was processing the complaint (August 16, 1990 to August 12, 1994), she had no idea that her son was processing a $3.2 million damage claim in her name.

3. When the formal complaint was set for hearing, the parties were required to file written notices of appearance. Elehue Freemon forged his mother's signature on a Notice of Appearance, and filed it with the Commission.

4. When that forgery was exposed, Elehue Freemon then tried to file a power of attorney that would permit him to represent his mother in this case. That ruse also failed. See FCC 94M-584 released October 21, 1994.

5. When AT&T announced that they would depose Lucille Freemon on October 4, 1994, Elehue Freemon realized that the truth was about to come out; i.e., that his mother had nothing to do with the suit. So he tried to head off her deposition by introducing the idea that Lucille Freemon was suffering from Alzheimer's disease and that therefore any testimony she would give couldn't be credited. This ploy also failed.

6. At her October 4, 1994 deposition Lucille Freemon clearly indicated that she was not and never had been a party to her son's deception. She disowned her February 9, 1989 affidavit that Elehue Freemon had attached to the August 16, 1990 formal complaint. In describing that affidavit, she said: "What's written on here is not the truth." (See Tr.70-72).

7. Moreover, her version of what happened on the night of May 30, 1988 at 10:30 p.m. more nearly coincides with AT&T's (Nancy Zolnikov's) version and differs substantially from what her son, Elehue Freemon, says happened.

8. Even at the December 12, 1994 hearing, Elehue Freemon unsuccessfully continued to try to impeach the co-complainant he had relied on for four years, his own mother.

Ultimate Conclusion

9. Elehue Freemon has tried to induce the Commission to act favorably on a $3.2 million damage claim against AT&T via a falsely captioned and falsely written complaint. From the outset and over a period of four years he has conducted himself dishonestly and deceitfully. Neither his complaint nor his subsequent verbal and written meanderings warrant any further consideration.

So unless an appeal is taken from this Initial Decision or the Commission reviews it on their own motion, Elehue Kawika Freemon's and Lucille K. Freemon's formal complaint (File No. E-590-393) IS DISMISSED;[22] and this proceeding IS TERMINATED.[23]

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[22] Note however that findings of fact have been made on both the assigned burden of proceeding and burden of proof (Findings 24-26 *supra.*), and on the substantive aspects of designated issues 1-6 (Findings 27-42 *supra.*) This means that even if an appellate body disagrees with the dismissal analysis (Findings 11-23 *supra.*) no remand will be needed.

[23] If exceptions aren't filed within 30 days, or the Commission doesn't review the case on their own motion, this Initial Decision will become effective 50 days after its public release. See 47 CFR 1.276(d).

FEDERAL COMMUNICATIONS COMMISSION

Walter C. Miller
Administrative Law Judge

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-121

In the Matter of

Amendment of Section 73.202(b), RM-8530
Table of Allotments,
FM Broadcast Stations.
(Nashville, North Carolina)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 15, 1995; Released: February 24, 1995

By the Chief, Allocations Branch:

1. At the request of Eternal Lamp, Inc. ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 9 FCC Rcd 6106 (1994), proposing the allotment of Channel 259A to Nashville, NC, as the community's first local aural broadcast service. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. No other comments were received.

Technical Summary

2. Channel 259A can be allotted to Nashville in compliance with the Commission's minimum distance separation requirements without a site restriction, at coordinates 35-58-12 North Latitude and 77-58-00 West Longitude.

3. We believe the public interest would be served by allotting Channel 259A to Nashville since it could provide the community with its first local aural broadcast service. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 10, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Nashville, North Carolina	259A

4. The window period for filing applications will open on **April 10, 1995**, and close on **May 11, 1995**.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-2

In the Matter of

Amendment of Section 73.202(b),	RM-8415
Table of Allotments,	RM-8465
FM Broadcast Stations.	
(Hazlehurst and Bude,	
Mississippi)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 15, 1995; Released: February 24, 1995

By the Chief, Allocations Branch:

1. At the request of PDB Broadcasting ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 9 FCC Rcd 663 (1994), proposing the allotment of Channel 282A to Hazlehurst, Mississippi, as the community's second local commercial FM transmission service. Douglas B. DeLawder ("DeLawder") filed a counterproposal requesting the allotment of Channel 282C3 to Bude, Mississippi.[2] Petitioner filed untimely comments and a motion to accept late filed comments.[3] DeLawder filed an opposition to the motion to accept petitioner's late filed comments and petitioner filed responsive comments. DeLawder filed reply comments.

2. In his counterproposal, DeLawder requests the allotment of Channel 282C3 to Bude, as the community's first local commercial FM station.[4] In support of his proposal, DeLawder states that the Town of Bude was organized in 1914 and has a 1990 census population of 969 persons. DeLawder submits that Bude is governed by a Mayor and Board of Aldermen. Further, he notes that the community has a number of retail establishments, including a large grocery store, two drug stores and several convenience shops.

3. Since no further consideration is warranted regarding petitioner's proposal, we believe the public interest would be served by adopting DeLawder's counterproposal. First, we find that Bude is a community for allotment purposes. As stated in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88, 101 (1982), community status is presumed to exist if a community is incorporated or listed in the U.S. Census. Although, Bude is not incorporated town, we have confirmed that it is an incorporated place listed in the U.S. Census with a 1990 U.S. Census population of 969 persons. Bude has an elected town government housed in a town hall and maintains water and sewer services to its residents.

4. Channel 282C3 can be allotted to Bude in compliance with the Commission's minimum distance separation requirements with a site requirement of 11.7 kilometers (7.3 miles) northeast to avoid a short-spacing with the licensed site of Station WHER(FM), Channel 279C, Hattiesburg, Mississippi.[5]

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 10, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Bude, Mississippi	282C3

6. The window period for filing applications will open on **April 10, 1995**, and close on **May 11, 1995**.

7. IT IS FURTHER ORDERED, That the petition for Rule Making filed by PDB Broadcasting (RM-8415), requesting the allotment of Channel 282A to Hazlehurst, Mississippi, IS DENIED.

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[1] The community of Bude, Mississippi, has been added to the caption.

[2] Public Notice of the counterproposal was given on April 20, 1994, (Report No. 2006).

[3] Petitioner filed comments restating its expression of interest in the Hazlehurst allotment 6 days after the deadline for initial comments were due with a motion to accept late-filed comments. Counsel for petitioner claims that due to the press of other business counsel inadvertently failed to submit comments on the due date. We will deny petitioner's request to accept its late-filed comments. In this regard, the Commission's procedural rules are designed to provide adequate time and opportunity for interested parties to fully participate in the decision making process and to avoid prejudice to competing parties by providing predictable, uniformly applicable rules. In the Table of Allotment rule making proceedings, the Commission requires an expression of interest in a proposed channel in order to conduct the rule making process in an orderly manner. Notification of the requirement is set forth in each Notice of Proposed Rule Making issued in response to channel allotment request. Late-filed expression of interests have been accepted and considered only in a situation where there is no opposition to the channel proposals and where there would be no adverse impact on another pending proposal. *See, Santa Isabel, Puerto Rico*, 3 FCC Rcd 2336 (1988), *Aff'd*, 4 FCC Rcd 3412 (1989); *aff'd sub nom. Amor Family Broadcasting v. FCC*, 918 F. 2d 960 (D.C. Cir. 1990). In this instance, petitioner failed to submit a timely expression of continuing interest in the proposed Hazlehurst channel as specifically required in the *Notice*, while DeLawder filed a timely counterproposal which was accepted for consideration. Since this is a contested proceeding, we will not accept petitioner's untimely filed expression of interest in light of the fact that acceptance would require the denial or dismissal of another timely proposal for use of the spectrum. In addition, DeLawder's and petitioner's responsive comments regarding petitioner's motion will not be considered.

[4] Station WMAU(FM), a noncommercial educational station, Channel 205C1, is licensed to the community of Bude, Mississippi.

[5] The coordinates for Channel 282C3 at Bude are North Latitude 31-32-33 and West Longitude 90-45-36.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Pam Blumenthal, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-118

In the Matter of

Amendment of Section 73.202(b), RM-8521
Table of Allotments,
FM Broadcast Stations.
(Norris, Tennessee)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 15, 1995; Released: February 24, 1995

By the Chief, Allocations Branch:

1. At the request of Norris Broadcasting Company ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 9 FCC Rcd 5736, (1994), proposing the allotment of Channel 294A to Norris, Tennessee, as the community's first local aural transmission service. Petitioner filed comments restating its intention to apply for Channel 294A, if allotted. No other comments were received.

2. We believe the public interest would be served by allotting Channel 294A to Norris, since it could provide the community with its first local FM service. Channel 294A can be allotted to Norris in compliance with the Commission's minimum distance separation requirements with a site restriction of 4.1 kilometers (2.5 miles) northeast in order to avoid a short-spacing conflict with Station WSKZ(FM), Channel 293C, Chattanooga, Tennessee.[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 10, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Norris, Tennessee	294A

4. The window period for filing applications will open on **April 10, 1995**, and close on **May 11, 1995**.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Pam Blumenthal, Mass Media Bureau, (202) 418-2180.

[1] The coordinates for Channel 294A at Norris are North Latitude 36-13-47 and West Longitude 84-02-59.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-132

In the Matter of

Amendment of Section 73.202(b), RM-8529
Table of Allotments,
FM Broadcast Stations.
(Reed City, Michigan)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 15, 1995; Released: February 24, 1995

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 9 FCC Rcd 6771 (1994), issued in response to a petition filed by Steven V. Beilfuss ("petitioner"). The *Notice* proposed the allotment of Channel 247A to Reed City, Michigan, as that community's first local broadcast service. Petitioner filed comments reaffirming his interest in the allotment of Channel 247A at Reed City. No other comments were received.

2. We believe the public interest would be served by allotting Channel 247A to Reed City, Michigan, as it will provide the community with its first local transmission service. Channel 247A can be allotted to Reed City consistent with the minimum distance separation requirements of the Commission's Rules provided there is a site restriction 1.9 kilometers (1.2 miles) southwest of the community.[1] Since Reed City is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government has been obtained for this allotment.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 10, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Reed City, Michigan	247A

4. The window period for filing applications for Channel 247A at Reed City will open on **April 10, 1995**, and close on **May 11, 1995**.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 247A at Reed City are 43-51-31 and 85-30-50.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: January 24, 1995

COMMON CARRIER BUREAU INVITES PUBLIC COMMENT ON USTA *EX PARTE* SUBMISSION

Comments: January 31, 1995

On January 18, 1995, the United States Telephone Association (USTA), the national association that represents local exchange carriers (LECs), filed in CC Docket No. 94-1 a document entitled "A USTA Proposal for the LEC Price Cap Plan." USTA's submission sets forth various substantive recommendations for modifying the Commission's current rules governing the price cap regulation of LECs. USTA states that this proposal modifies the position that it previously has taken in this proceeding.

The Commission initiated CC Docket No. 94-1 to review the performance of LECs under price cap regulation and to consider possible changes to the current plan. Because the USTA proposal was not included in its comments in the regular pleading cycle of this proceeding, other parties to this proceeding have not had an opportunity to address its revised recommendations. In the interest of compiling as a complete a record as possible in this docket, the Common Carrier Bureau hereby invites interested parties to review and comment upon the USTA *ex parte* submission. The Bureau encourages parties to submit their *ex parte* comments by January 31, 1995.

An original and four copies of all comments must be filed in accordance with Section 1.51(c) of the Commission's Rules, 47 C.F.R. § 1.51(c). In addition, one copy of each comment must be filed with International Transcription Services (ITS), the Commission's copy contractor, at its offices at 2100 M Street, N.W., Washington, D.C. 20554. For further information, contact Dan Grosh or Anthony Bush, Tariff Division, Common Carrier Bureau.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Lincoln Telephone and
Telegraph Company
Petition for Waiver of the
Commission's Rules To Establish
500 Access Service

MEMORANDUM OPINION AND ORDER

Adopted: January 24, 1995; Released: January 26, 1995

By the Acting Chief, Tariff Division, Common Carrier Bureau:

I. INTRODUCTION

1. In the summer of 1994, 12 local exchange carriers (LECs) filed petitions for waiver of Part 69 of the Commission's Rules, 47 C.F.R. Part 69, to establish one or more new rate elements for 500 access service.[1] The Common Carrier Bureau (Bureau) granted those 12 waiver petitions on November 30, 1994.[2] On December 9, 1994, Lincoln Telephone and Telegraph Co. (Lincoln) sought waiver of Part 69 of the Commission's Rules to establish 500 access service, similar to some of the waivers granted in the *500 Access Waiver Order*. No oppositions were filed in response to Lincoln's waiver petition. For the reasons below, we grant Lincoln's waiver request.[3]

II. BACKGROUND AND SUMMARY OF PETITION

2. LECs provide 500 access service to its access customers who, in turn, provide 500 service to end users. 500 service is a new "follow me" personal communications service which enables customers, among other things, to instruct their 500 service providers where to route their calls, whether to landline or cellular telephones, pagers, or to a voice messaging service.[4] In providing 500 access service, the LECs must screen the first six digits of the ten digit 500 number (*i.e.*, 500-NXX) in order to identify and route calls to the subscriber's designated 500 service provider.[5] There are two ways that a LEC can perform this six-digit screening and routing. First, the carrier can use switch-based translation, in which case it deploys a translation table contained in the software of the LEC switches, located at either the end office or the access tandem, to route the call to the subscriber's 500 service provider.[6] Alternatively, if LEC's end office or access tandem has Advanced Intelligent Network (AIN) capability, the LEC launches a query to a centralized AIN database to identify the 500 service provider and routing.[7]

3. The Bureau did not impose a uniform rate structure for 500 access service on the LECs, because such a uniform rate structure would force some carriers into rate structures unrelated to the way they incur costs, and a uniform rate structure might have delayed the availability of 500 service.[8] Accordingly, LECs were granted waivers to establish rate structures to recover the costs of providing 500 access service consistently with the way they incur those costs. Specifically, LECs planning to use switch-based translation were granted waivers to establish one or more nonrecurring charges for 500 access service.[9] LECs planning to use AIN-based translation were permitted to establish recurring charges for their 500 access services, in addition to a small nonrecurring charge.[10] Similarly, LECs who intended to use switch-based translation initially but expected to convert to AIN some time in 1995 were granted waivers to establish recurring charges.[11] Finally, we declined to grant a blanket waiver to other LECs, but stated that other LECs seeking a waiver comparable to one granted in the *500 Access Waiver Order* would warrant "expedited consideration."[12]

4. Lincoln states that it plans to establish a nonrecurring charge to be assessed on a per-order basis, regardless of the number of NXX codes specified in the service order.[13] Lincoln asserts that its proposed waiver request closely matches that of Pacific Bell, granted in the *500 Access Waiver Order*.[14]

III. DISCUSSION

5. The Commission may exercise its discretion to waive a rule where there is "good cause" to do so,[15] and where the particular facts would make strict compliance inconsistent with the public interest.[16] Further, the Commission's grant

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[1] Ameritech Operating Companies, *et al.*, Petitions for Waiver of Sections 69.4(b) and 69.106 of Part 69 of the Commission's Rules, DA 94-1350 (Com. Car. Bur., released Nov. 30, 1994) (*500 Access Waiver Order*).

[2] *Id.*

[3] Concurrently with its waiver request, Lincoln filed Transmittal No. 103 to provide 500 access service. Lincoln's tariff filing is unopposed. Generally, any tariff filing establishing a rate element inconsistent with Part 69 is patently unlawful, and therefore subject to rejection unless and until a petition for waiver has been granted. *See* US West Communications, Inc., Revisions to Tariff F.C.C. No. 5, 9 FCC Rcd 5228 (Com. Car. Bur. 1994). In this case, however, the Bureau has specifically permitted LECs to file their waiver requests and tariffs simultaneously. *500 Access Waiver Order*, at para. 31. Accordingly, we will not reject Transmittal 103 on this basis.

[4] *500 Access Waiver Order* at paras. 2-3.

[5] *Id.* at para. 3. The 500 service provider, using database technology, will then route the call to the telephone or other device designated by the 500 service subscriber. *Id.*

[6] *Id.* at para. 4.

[7] *Id.*

[8] *Id.* at para. 27.

[9] *Id.* at para. 29.

[10] *Id.* at para. 28.

[11] *Id.* at para. 30.

[12] *Id.* at para. 31.

[13] Lincoln Waiver Petition at 2.

[14] *Id.* at 2-3.

[15] *See* Section 1.3 of the Commission's Rules, 47 C.F.R. § 1.3.

[16] WAIT Radio v. FCC, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

of a waiver must be based on articulated, reasonable standards that are predictable, workable, and not susceptible to discriminatory application.[17] We conclude that the waiver Lincoln seeks here is substantially similar to the waivers granted in the *500 Access Waiver Order* to establish nonrecurring charges for 500 access service.[18] Therefore, we find that Lincoln has shown good cause for the waiver it seeks.

IV. ORDERING CLAUSE

6. Accordingly, IT IS ORDERED that the petition for waiver filed by Lincoln Telephone and Telegraph Co. IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Geraldine A. Matise
Acting Chief, Tariff Division
Common Carrier Bureau

[17] Northeast Cellular Telephone Co. v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990).
[18] *See 500 Access Waiver Order* at para. 28.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Bell Atlantic — Transmittal No. 697
Revisions to Tariff F.C.C. No. 1

ORDER

Adopted: January 20, 1995 **Released: January 20, 1995**

1. On September 23, 1994, Bell Atlantic filed Transmittal No. 697 to introduce Short Term DS3 Service. Short Term DS3 Service is provided for a minimum period of 30 days and the customer must place connect and disconnect orders for the service at the same time. Transmittal 697 is scheduled to take effect on January 21, 1995. MCI Telecommunications Corporation (MCI) filed a petition to reject or suspend and investigate Transmittal 697, and Bell Atlantic filed a reply.

2. Bell Atlantic states that its Short Term DS3 Service will be provided only where facilities permit and is subject to a full month's billing regardless of time in service. Further, special construction charges for nonreusable equipment or additional labor costs apply. The transmittal also provides that the same nonrecurring channel mileage charges apply as for month-to-month DS3 service. A separate and distinct rate, however, applies for the channel termination of a short-term DS3 facility. According to Bell Atlantic, the costs associated with Short-Term DS3 Services are based on existing DS3 channel termination costs adjusted to reflect periodic utilization associated with a short term, temporary service. Bell Atlantic applied a utilization factor of 50 percent to adjust DS3 costs to reflect short term use of its facilities.[1]

3. MCI objects to the cost support material supplied by Bell Atlantic in Transmittal 697. According to MCI, Bell Atlantic is proposing to apply a new monthly channel termination rate and existing DS3 installation charges to recover its costs for the service.[2] MCI maintains, however, that the costs of providing Short-Term DS3 Service are the same as those for providing Bell Atlantic's DS3 Electrical Entrance Facilities. MCI contends that because the costs of providing Short-Term DS3 Service are determined by applying a 50 percent utilization factor to the costs of DS3 Electrical Entrance Facilities, this effectively doubles the cost of the former service. According to MCI, Bell Atlantic's utilization factor is critical to determining whether its overhead cost recovery is consistent with the Commission's Rules.[3]

4. In response, Bell Atlantic asserts that there is only a 2 percent differential between the rates for short term, as opposed to month-to-month DS3 service. Bell Atlantic asserts that the differential is more than justified by the difference in costs of providing Short-Term DS3 Service that involves lower utilization of the equipment installed and additional administrative expenses. Bell Atlantic states that it bases its calculations on the assumption that the equipment will be used approximately 50 percent of the time, an assumption based on its experience with other short-term services.[4]

5. On January 20, 1995, Bell Atlantic filed Transmittal No. 735, to modify Transmittal 697 to permit the Short Term DS3 customer to renew the service for 30 days or less, provided that the request is received prior to the disconnect date of the initial service period. Bell Atlantic also increased the utilization factor from 50 to 67 percent and provided additional cost support information with its new transmittal pursuant to Section 61.49 of the Commission's Rules, 47 C.F.R. § 61.49.

6. We have reviewed the tariff filed by Bell Atlantic, the tariff revisions, and all related pleadings. Based on these submissions, we conclude that no compelling argument has been presented that this tariff, as revised, is patently unlawful so as to warrant rejection or that an investigation is warranted at this time.

7. Accordingly, IT IS ORDERED that the petition to reject, or to suspend and investigate Bell Atlantic Tariff F.C.C. No. 1, Transmittal No. 697, filed by MCI Telecommunications Corporation IS DENIED.

8. IT IS FURTHER ORDERED that Application No. 231, filed on January 20, 1995, by Bell Atlantic IS GRANTED. This will enable Bell Atlantic to file the tariff material requested therein to become effective on not less than one day's notice.

9. IT IS FURTHER ORDERED that, for this purpose, Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58, 61.59, are waived. Bell Atlantic should cite the "DA" number of the instant Order as the authority for this filing.

FEDERAL COMMUNICATIONS COMMISSION

Geraldine A. Matise
Acting Chief, Tariff Division
Common Carrier Bureau

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[1] Bell Atlantic Transmittal No. 697, Description and Justification at 4.
[2] MCI Petition at 1.
[3] *Id.* at 2-3.
[4] Bell Atlantic Reply at 1-2.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Ameritech Operating Companies — Transmittal No. 823
Revisions to Tariff F.C.C. No. 2

Bell Atlantic — Transmittal Nos. 698, 733
Telephone Operating Companies
Revisions to Tariff F.C.C. No. 1

BellSouth — Transmittal No. 229
Telecommunications Inc.
Revisions to Tariff F.C.C. No. 1

Cincinnati Bell Telephone — Transmittal No. 666
Company
Revisions to Tariff F.C.C. No. 35

Citizens — Transmittal Nos. 9, 10, 12, 14
Telecommunictions
Companies
Revisions to Tariff F.C.C. No. 1

GTE Telephone — Transmittal No. 914
Operating Companies
Revisions to Tariff F.C.C. No. 1

GTE System — Transmittal No. 113
Telephone Companies
Revisions to Tariff F.C.C. No. 1

Lincoln Telephone — Transmittal Nos. 99, 101, 102
and Telegraph Co.
Revisions to Tariff F.C.C. No. 3

Nevada Bell — Transmittal No. 201
Revisions to F.C.C. Tariff No. 1

The NYNEX Telephone Companies — Transmittal No. 333
Revisions to Tariff F.C.C. No. 1

Pacific Bell — Transmittal No. 1746
Revisions to Tariff F.C.C. No. 128

Rochester — Transmittal No. 230
Telephone Corporation
Revisions to Tariff F.C.C. No. 1

Southern New England — Transmittal No. 626
Telephone Co.
Revisions to Tariff F.C.C. No. 39

Southwestern Bell — Transmittal Nos. 2386, 2420
Telephone Company
Revision to Tariff F.C.C. No. 73

United and Central — Transmittal Nos. 19, 21, 23
Telephone Companies
Revisions to Tariff F.C.C. No. 1

US West — Transmittal Nos. 543, 586
Communications, Inc.
Revisions to Tariff F.C.C. No. 5

ORDER

Adopted: January 20, 1995; Released: January 20, 1995

By the Acting Chief, Tariff Division, Common Carrier Bureau:

1. On May 27, 1994, the Commission released its *Tandem Switching Order*,[1] which required Tier 1 local exchange carriers (LECs) except members of the National Exchange Carrier Association (NECA), to provide interested parties, including competitive access providers (CAPs), interexchange carriers (IXCs), and end users, signalling information necessary to provide tandem switching functions for switched transport services. Consistent with the *Tandem Switching Order*, all Tier 1 LECs filed tariff transmittals on September 26, 1994, to offer interested parties tandem signalling information necessary to provide tandem switching functions.[2] Specifically, the LECs would transmit from equal access end offices Carrier Identification Codes (CIC) which specify the IXC handling the call, and OZZ codes, which identify the IXC trunk group carrying the call to interconnected tandems.[3] In end offices in which common channel signalling (CCS) or signalling system 7 (SS7) is available, interested third parties (hereafter referred to as "tandem switch providers" or "TSPs") have the option of receiving signalling information via SS7 or multi-frequency (MF) signalling.[4]

2. The rate structures proposed by the LECs vary significantly. Some of the LECs propose to provide tandem signalling information as a nonchargeable option.[5] Other LECs propose to impose a recurring usage sensitive charge

[1] Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, Transport Phase II, Third Report and Order, 9 FCC Rcd 2718 (1994) (*Tandem Switching Order).*

[2] BellSouth filed its transmittal on September 24, 1994.

[3] *See, e.g.,* Ameritech Transmittal No. 823, Description and Justification (D&J) at 1.

[4] In an MF signalling environment, call setup and billing information is transmitted through the same circuits as the call itself. In a CCS or SS7 environment, call setup and billing data are transmitted through network facilities separate from those that transmit the actual communications between the calling party and the called party. The latter environment allows for faster call setup times and facilitates with advanced features. *Tandem Switching Order,* 9 FCC Rcd at 2718.

[5] *See, e.g.,* GTOC Transmittal No. 914, D&J at 2.

that will be applied for each trunk group the TSP chooses to equip with this signalling option.[6] Other LECs propose to impose a non-recurring charge (NRC) per trunk group or per CIC in each end office.[7]

3. The Association for Local Telecommunications Services (ALTS) filed a petition to suspend and investigate the transmittals filed by Ameritech, Bell Atlantic, BellSouth, Pacific Bell, Southwestern Bell and US West. MCI Telecommunications Corporation (MCI) filed a petition to suspend and investigate all of the above-captioned transmittals, and WilTel, Inc. (WilTel) filed a petition to reject the transmittal filed by Southwestern Bell. Eight of the LECs filed a reply. BellSouth's tariff is scheduled to become effective on January 21, 1995, while the remaining LECs' tariffs take effect on January 24.

4. ALTS and MCI oppose the restrictions by a number of LECs of the provision of signalling information to one-way trunks for terminating traffic. ALTS Petition at 3; MCI Petition at 3. ALTS maintains that this practice is based on the LECs' refusal to accept TSP billing tapes and to undertake simple business arrangements to ensure the accuracy of those tapes. ALTS Petition at 3. ALTS argues that the Commission, in the *Tandem Switching Order*, considered and rejected LEC concerns about utilizing TSP-provided billing recordings. *Id.* at 5. In support of the use of TSP-provided billing tapes, ALTS states that competitors in other industries have used one another's records for billing customers for decades. *Id.* at 4-6.

5. ALTS and MCI next oppose the imposition by several of the LECs of NRCs to provide tandem signalling. MCI notes that the *Tandem Switching Order* indicated that the costs to the LECs of providing signalling information from their end offices would be *de minimus*. MCI further notes that the Commission's statement is supported by the fact that at least eight LECs intend to provide tandem signalling at no cost. MCI Reply at 7. It therefore questions why the other LECs seek to impose NRCs for the service ranging from $17.67 per trunk group for BellSouth to $11,387.28 per order for Lincoln Telephone. *Id.* at 6-7. MCI also argues that Lincoln Telephone has not provided sufficient cost justification to support its *NRC*. *Id.* In particular, MCI disagrees with Lincoln's recovery of costs through NRCs that would normally be recovered through overhead loadings on recurring charges. *Id.* ALTS also asks that Ameritech justify its estimate that it will take 2030 hours to modify its Carrier Access Billing System (CABS) to bill tandem signalling service. ALTS Petition at 6-7.

6. ALTS is further concerned that the LEC tariffs appear to provide that tandem signalling involving 800 and 500 services traffic from LEC end offices that do not have Service Switching Points (SSPs) cannot be provided without dedicated trunk interfaces.[8] *Id.* at 7. Therefore, ALTS requests that the Commission require the LECs to clarify their tariffs to state the conditions under which end-office-to-tandem signalling information for 800 and 500 services traffic will be made available. *Id.*

7. ALTS, along with MCI, also complains about the LEC tariffs' failure to provide for overflow of traffic from a trunk group serving a TSP tandem switch to a trunk group serving the LEC tandem switch. ALTS Petition at 7-8; MCI Petition at 8. MCI maintains that the LECs' refusal to accommodate traffic overflow from TSP facilities is an anti-competitive practice that is being employed by the LECs to obstruct the Commission's goal of promoting diversity, economies of scale, efficiency and innovation in the provision of telecommunications service. MCI Petition at 8. ALTs also objects to language in some of the LEC tariffs that prohibits sending CABS billing information directly to a TSP instead of to the owner of the underlying CIC. ALTS Petition at 8. It maintains that this practice cannot be justified in situations where the TSP has a Letter of Authority (LOA) from the CIC owner, and can demonstrate financial ability to pay for the CABS billing. *Id.*

8. Finally, WilTel alleges that Southwestern Bell is the only LEC refusing to offer tandem signalling in an SS7 environment, in violation of the *Tandem Switching Order*. WilTel Petition at 2. WilTel adds that Southwestern Bell's refusal to offer SS7 tandem signalling constitutes an anti-competitive practice that violates Sections 201(b) and 202(a) of the Communications Act. 47 U.S.C. §§ 201(b) and 202(a). *Id.* at 2.

9. In response, those LECs initially requiring one-way trunks between LEC end offices and TSP-operated tandem switches argue that provisioning tandem signalling through one-way trunks does not violate the requirements of the *Tandem Switching Order* because that Order only requires the LECs to accept billing tapes if the TSP's customer is the customer of record. Pacific Bell Reply at 4. In any event, the LECs state that they must depend on one-way trunks for terminating traffic. The LECs explain that when a trunk is modified to provide signalling information, they are unable to measure the TSP's terminating traffic on that trunk due to technical limitations. *See, e.g.*, US West Reply at 10; Bell Atlantic Reply at 4; BellSouth Reply at 2. Furthermore, they argue that LEC reliance on TSP-provided tapes would generate billing disputes and would cause harm to the LECs and to their customers. *See, e.g.*, Southwestern Bell Reply at 4; BellSouth Reply at 2.

10. Ameritech disputes the claim made by ALTS that the requirement to use one-way trunks would dramatically increase the cost to TSPs of providing tandem switching, responding that TSP use of separate one-way trunk groups would only increase typical trunk group requirements by approximately 5-15 percent. Ameritech Reply at 2.

Ameritech maintains that this nominal increase in trunk group requirements is far less costly than the administrative expenses involved in employing external auditors or other means suggested by ALTS to verify TSP-provided billing information. *Id.*

11. The LECs respond that the imposition of NRCs to TSPs that they are proposing are modest and are designed to recover their cost of updating routing and translation tables. *See, e.g.*, Rochester Reply at 2; US West Reply at 17. Lincoln defends its treatment of these costs as direct costs on the grounds that such costs were directly incurred due to the *Tandem Switching Order* and should be borne by those who benefit from the service. Lincoln Telephone Reply at 1-2.[9] Ameritech explains that the 2030 hours

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[6] *See, e.g.*, SNET Transmittal No. 626, D&J at 7.

[7] *See, e.g.*, BellSouth Transmittal No. 229, D&J at 2.

[8] The SSP is generally an end office or tandem switch equipped with the necessary hardware and software for network communications.

[9] On January 18, 1995, Lincoln filed an Application for Special Permission to revise its Transmittal No. 99. These revisions reduce Lincoln's rates for CIC and OZZ signalling information optional features.

required to modify its CABS reflects the time needed to enable the system to bill terminating traffic for the new tandem signalling feature, and that these modifications and resulting costs are unique to situations involving TSPs. Ameritech Reply at 2-3.

12. Regarding the availability of tandem signalling information for 800 and 500 services traffic, the LECs generally respond that no additional trunking is necessary to provide these services if the TSP is served from an end office that uses a switch capable of handling 800 and\or 500 traffic. *See, e.g.*, Bell Atlantic Reply at 5; BellSouth Reply at 4-5; Pacific Bell Reply at 9. In response to the argument that they should allow the overflow of traffic between LEC and TSP tandems, the LECs argue that the *Tandem Switching Order* does not require the LECs to provide tandem-to-tandem overflow service. Pacific Bell Reply at 5; NYNEX Reply at 6-7. In any event, the LECs note that LEC tandems do not currently have the ability to identify and properly bill for overflow traffic. According to the LECs, the provision of such overflow service would require significant alterations to their end office hardware and their billing systems. US West Reply at 6-8; Pacific Bell Reply at 5-6. Regarding the argument that the LEC should directly bill the TSP in some circumstances, US West explains that if a customer of record designates another as its agent, it will comply with that designation. US West Reply at 16. NYNEX, on the other hand, maintains that absent changes to its end office recording systems and its CABS, it must continue to send usage sensitive charges to the customer identified by the CIC, consistent with industry procedures. NYNEX Reply at 9-10.

13. In response to WilTel's claim that it refuses to provide SS7 tandem signalling, Southwestern Bell explains that it is not possible to offer CIC and OZZ signalling from end offices in an SS7 environment because of the need to resolve technical issues. Southwestern Bell Reply at 2. Southwestern Bell maintains that the LEC should not be required to tariff services which it is incapable of properly ordering, provisioning, or billing. *Id.*[10]

14. The Tariff Division has reviewed the above-captioned tandem signalling tariffs, the revisions to those tariffs, and all associated pleadings. We conclude that no compelling argument has been presented that these tariffs are patently unlawful so as to warrant rejection or that an investigation is warranted at this time.

15. Accordingly, IT IS ORDERED that the petition to reject Southwestern Bell Telephone Company Tariff F.C.C. No. 73, Transmittal No. 2386, filed by WilTel, Inc., IS DENIED.

16. IT IS FURTHER ORDERED that the petition to suspend and investigate Ameritech Operating Companies Tariff F.C.C. No. 2, Transmittal No. 823; Bell Atlantic Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 698; BellSouth Telecommunications, Inc., Tariff F.C.C. No. 1, Transmittal No. 229; The NYNEX Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 333; Pacific Bell Tariff F.C.C. No. 128, Transmittal No. 1746; Southwestern Bell Telephone Company Tariff F.C.C. No. 73, Transmittal No. 2386; and US West Communications, Inc., Tariff F.C.C. No. 5, Transmittal No. 543 filed by the Association for Local Telecommunications Services IS DENIED.

17. IT IS FURTHER ORDERED that the petition to suspend and investigate the above-captioned tariff transmittals filed by MCI Telecommunications Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Geraldine A. Matise
Acting Chief, Tariff Division
Common Carrier Bureau

[10] On January 17, 1995, Southwestern Bell filed an Application for Special Pemission to revise Transmittal No. 2386. This application was granted on January 19, under Special Permission No. 95-81. These revisions, among other things, provide that Southwestern Bell will offer tandem signalling in an SS7 environment.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
February 17, 1995

Released: February 27, 1995

Mr. David J. Gudino
Attorney
GTE Hawaiian Telephone
Company Incorporated
1850 M Street, N.W.
Suite 1200
Washington, D.C. 20036

IN REPLY REFER TO:
1600E

Dear Mr. Gudino:

On February 15, 1995, you filed a request for an extension of time for GTE Hawaiian Telephone Company Incorporated (GTE) to file a response to the pole attachment complaint filed by Daniels Communications Partners d/b/a Hawaiian Cablevision Company, et al. (Daniels), PA 95-009.

A previous request by GTE for an extension until February 21, 1995, to respond to the complaint was granted on February 13, 1995. You state that the parties have met and have agreed to continue negotiations with the goal of reaching a settlement for all the complaints. Because of these settlement discussions GTE believes that an additional extension of time until March 6, 1995, would promote administrative efficiency and would further the public interest. You also state that the complainants are not opposed to this extension request.

After careful consideration we believe that GTE has shown good cause to justify the grant of an extension of time. Therefore, GTE has until March 6, 1995 to file its response in the above referenced complaint.

Sincerely,

Kenneth P. Moran
Chief, Accounting and Audits Division

cc: All Parties

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Big Horn Communications, Inc. (Assignor) File No. BALCT-940314KF

and

KYUS Broadcasting Corporation
(Assignee)

For Assignment of License of
Station KYUS-TV, Channel 3
Miles City, Montana

MEMORANDUM OPINION AND ORDER

Adopted: February 15, 1995; Released: February 27, 1995

By the Commission:

1. The Commission has before it for consideration an application to assign the license of station KYUS-TV (ABC), Channel 3, Miles City, Montana, from Big Horn Communications, Inc. (Big Horn) to KYUS Broadcasting Corporation (KBC). Big Horn, the licensee of KYUS-TV, is currently authorized to operate the station "primarily as a satellite" of its commonly-owned station KSVI-TV (ABC), Channel 6, Billings, Montana. The sole stockholder of KBC, the proposed assignee, also controls the licensee of station KXGN-TV (CBS,NBC), Channel 5, Glendive, Montana. Because the predicted Grade B contours of KYUS-TV and KXGN-TV overlap, the proposed acquisition would violate the duopoly provision of Section 73.3555 of the Commission's Rules. However, KBC proposes to operate KYUS-TV as a satellite of KXGN-TV pursuant to the satellite exception contained in Note 5 to the Commission's multiple ownership rule. The assignment application and satellite proposal are unopposed.

2. Under our satellite policy, *Television Satellite Stations*, 6 FCC Rcd 4212 (1991) (petitions for partial stay and reconsideration pending),[1] applicants for television satellite status are entitled to a presumption that the proposed satellite operation is in the public interest, if the applicants meet the following three criteria: (1) there is no City Grade signal contour overlap between the parent and the satellite; (2) the proposed satellite would provide service to an underserved area; and (3) no alternative operator is ready and able to construct or to purchase and operate the proposed satellite as a full-service station. *Id.* 4213-14. Applications that qualify for the presumption, and are unrebutted by an opposing party, will be viewed favorably by the Commission. *Id.* at 4214. For the reasons set forth below, we find that the proposed operation of KYUS-TV as a satellite station of KXGN-TV is consistent with our policy.

3. The applicant's engineering study demonstrates that there will be no overlap of the City Grade contours of KYUS-TV and KXGN-TV. Thus, the satellite proposal meets the first component of the presumption.

4. With respect to the second criterion, applicants can demonstrate that an area is underserved by using one of two tests. The first is a "transmission test," whereby a proposed satellite's community of license is considered underserved if there are two or fewer full-service stations already licensed to it.[2] Our records show that KYUS-TV is the only television station licensed to Miles City. Therefore, utilizing the "transmission test," the applicant has demonstrated that the proposed satellite station will provide service to an underserved area.

5. Finally, to qualify for the presumption, applicants must demonstrate that no alternative operator is ready and able to construct or to purchase and operate the television station as a full-service station. In this regard, KBC submitted an affidavit of Thomas Hendrickson, who has been President of Big Horn since July 1989. Mr. Hendrickson states that KYUS-TV has been operated as a satellite since its acquisition by Big Horn in 1986. Nevertheless, Mr. Hendrickson maintains that during his tenure as the licensee's president, he came close to shutting down the station on several occasions because the station never created enough revenue to pay its operating costs. Also, during his tenure, Mr. Hendrickson states that he had discussed the sale of KYUS-TV with many people in the broadcasting business, including three prominent nationally known media brokerage companies which declined to list the station. Statements from several of these contacts were also submitted by KBC. According to James W. Blackburn, Jr. of Blackburn & Company, Incorporated, the size and location of the Miles City market made KYUS-TV's operation as a full-service station "economically impossible." That opinion was also shared by Robert Harrison, an experienced broadcast consultant who had earlier conducted an on-site evaluation of Big Horn's operations in Montana. According to Neilsen's November 1993 audience estimates, Custer County, in which Miles City is located, has only 4,000 households and KYUS-TV reaches only 3,200 of them. Based on this data and the fact that Miles City is an isolated community located 70 miles from Glendive and 145 miles from Billings, KBC alleges that it is simply impossible for KYUS-TV to generate adequate advertising revenues from service to 3,200 homes to cover a significant portion of the costs that a full-service station would incur. Consequently, KBC concludes that no buyer will be found that would attempt or be able to operate KYUS as a full-service station. Based on the information provided, we believe that Big Horn has adequately dem-

[1] We note that there is an outstanding proceeding concerning television satellite stations which invites comment on whether satellites should be exempted from the 12-station limit set out in the multiple ownership rules. *Second Further Notice of Proposed Rulemaking* in Docket No. 87-8, 6 FCC Rcd 5010 (1991). Grant of the application before us will not implicate the 12-station rule.

[2] We have also defined an "underserved area" in terms of a "reception test," but that test is not material here. See *Television Satellite Stations*, 6 FCC Rcd at 4215.

onstrated the unlikelihood of finding an alternative operator willing and able to operate KYUS-TV as a full-service station. See *Midwest Communications, Inc.*, 7 FCC Rcd 159, 161-62 (1991). Thus, we conclude that the applicant has satisfied the third criterion.

6. Therefore, the applicants have established the basis for presuming that continued satellite operation should be authorized, and we find no facts suggesting that the presumption not be followed in this case. Accordingly, we find that KBC's proposed satellite operation of KYUS-TV is in the public interest. In view of the foregoing, and having determined that the applicants are qualified in all other aspects, we find that a grant of the application would serve the public interest.

7. Accordingly, IT IS ORDERED, That the application (BALCT-940314KF) for consent to assign the license of station KYUS-TV, Miles City, Montana, from Big Horn Communications, Inc. to KYUS Broadcasting Corporation, IS GRANTED.

8. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this Memorandum Opinion and Order to the applicants by Certified Mail -- Return Receipt Requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

C-TEC Cable Systems of Michigan, Inc.

Petition for Reconsideration

of the Certification of
Cascade Charter Township, MI (MI1343)
to Regulate Basic Cable Service Rates

MEMORANDUM OPINION AND ORDER

Adopted: December 19, 1994; Released: December 20, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On October 29, 1993, C-TEC Cable Systems of Michigan, Inc. ("C-TEC") filed a timely petition for reconsideration, challenging the certification of Cascade Charter Township ("Cascade") to regulate C-TEC's basic cable service and associated equipment rates.[1] Cascade filed an opposition to C-TEC's petition to which C-TEC filed a reply. In addition, both parties filed supplemental pleadings pursuant to the Commission's July 29, 1994 order.[2]

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate the basic cable service rates of cable operators which are not subject to effective competition.[3] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition, unless the franchising authority has actual knowledge to the contrary.[4] Certification becomes effective thirty days from the date of filing, unless the Commission finds that the franchising authority does not meet the statutory certification requirements.[5] Cable operators may file petitions for reconsideration of the franchising authority's certification within thirty days from the date such certification becomes effective.[6] Regulation of rates is automatically stayed pending review of a timely filed petition for reconsideration alleging the presence of effective competition.[7]

II. DISCUSSION

3. C-TEC argues that its cable system is subject to effective competition because it serves fewer than 30 percent of the households in Cascade, the franchise area.[8] Specifically, C-TEC claims that it serves 129 of the 1,314 households (that is, occupied housing units)[9] in its franchise area, or 10.0 percent of the total number of households. As supporting documentation, C-TEC submits a copy of a computer print-out with sufficient subscriber information to show that it serves 129 households in the franchise area. In addition, it submits a copy of the relevant page of the 1990 Census data[10] which shows that there are 1,314 occupied housing units in Cascade Township. Finally, C-TEC provides a declaration under penalty of perjury from a responsible official certifying the accuracy of the data included in the petition and the supplement to the petition.

4. Cascade contends that C-TEC has made an affirmative decision to redefine its franchise area.[11] As C-TEC has no subscribers in the portions of the Township served by a second system, TCI Cablevision of West Michigan, Cascade argues that the franchise area, for purposes of determining the existence of effective competition, is that area actually

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[1] Cascade filed its "Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Lack of Effective Competition" ("Form 328") on September 28, 1993, which became effective on October 28, 1993.

[2] *Cable Operator's Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Service Rates*, 9 FCC Rcd 3656 (1994).

[3] 47 U.S.C. § 543(a)(4).

[4] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[5] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, and the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition. 47 C.F.R. § 76.910(b). *See also*, 47 U.S.C. § 543 (a)(4).

[6] 47 C.F.R. §§ 1.106, 76.911, *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[7] 47 C.F.R. § 76.911(c)(1).

[8] The Cable Act (Communications Act of 1934 § 623(a)(2), 47 U.S.C. §543(l)(1)(A)) and Commission's rules (47 C.F.R. § 76.905(a) provide that only the rates of cable systems that are not subject to effective competition may be regulated. One of the bases for which a cable system will be deemed to be subject to effective competition is if fewer than 30 percent of the households in the system's franchise area subscribe to the system's cable service. Communications Act of 1934 § 623(l)(1)(A), 47 U.S.C. § 543 (l)(1)(A); 47 C.F.R. § 76.905(b)(1).

[9] As the Commission stated recently, "we presume that Congress did not intend households' to have a different meaning than in the 1990 Census that would include vacant units." *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (*"Third Recon. Order"*). The count of "households" in the 1990 Census reflects only occupied housing units. *See* Bureau of the Census, 1990 Census of Population and Housing, Summary Population and Housing Characteristics, Michigan, 1990 CPH-1-24, Appendix B at B-8.

[10] As the Commission stated recently, 1990 Census data is an appropriate source for household data. *Cable Operators' Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates*, 9 FCC Rcd 3656 (1994).

[11] In the *First Order on Reconsideration*, the Commission clarified the definition of "franchise area" for purposes of determining effective competition. *First Order on Reconsideration, Second Report and Order and Order and Third Notice of Proposed Rulemaking*, MM Docket No. 92-266, 9 FCC Rcd 1164 (1993) (*"First Recon. Order"*). Generally, "[a] franchise area is the area a system operator is granted authority to serve in its

served by C-TEC which Cascade contends contains 157 households. Thus, because C-TEC serves 131 of the 157 households, or 83 percent of the households in this "redefined" franchise area, Cascade argues that C-TEC is not subject to effective competition.

5. In response, C-TEC contends that it has not acted in any way to restrict its franchise area. C-TEC further argues that permitting a redefinition of the franchise area simply because it does not as yet provide cable service to all portions of the Township would amount to an improper substitution of a "homes passed" test for the appropriate count of "households" test. Thus, C-TEC contends that Cascade has not met its burden of demonstrating a "redefinition" of the franchise area.

6. As a preliminary matter, we are unpersuaded that the appropriate franchise area for purposes of effective competition is something less than the entire Township. Cascade provides insufficient evidence to support its claim that C-TEC has made an affirmative decision to limit its service area to the area it actually serves. The only support that Cascade presents for its position is the fact that C-TEC does not now offer service in certain portions of the Township. As the Commission stated in the *First Recon. Order*, "the fact that a franchise area has not as yet been filled out by construction of a system would not by itself be taken as redefining the service area."[12] Cascade has offered no evidence showing that C-TEC has refused to provide service beyond the area currently served. As such, we find that Cascade has failed to sustain its burden of proof that C-TEC has redefined its franchise area. Thus, for purposes of evaluating the presence of effective competition, the relevant area here is the entire area authorized by the franchise, namely the entire Township.

7. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[13] The operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's rules, is present within the franchise area.[14] C-TEC has met this burden. C-TEC appropriately relied on data reflecting the number of households as required by our rules.[15] Relying on this data, C-TEC has submitted sufficient evidence demonstrating that its cable system serving Cascade, its franchise area, serves 129 of the 1,314 households, or 10.0 percent of the households within its franchise area. Thus, we find C-TEC's system serving Cascade Charter Township is subject to effective competition. Accordingly, its petition is granted.

III. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED that the petition for reconsideration, filed by C-TEC Cable Systems of Michigan, Inc. challenging the certification of Cascade Charter Township, Michigan to regulate C-TEC's rates, IS GRANTED.

9. IT IS FURTHER ORDERED that the certification of Cascade to regulate the basic cable service rates of C-TEC IS RESCINDED.

10. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's rules, 47 C.F.R. Section 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

franchise. *Id.* at 1180. The Commission stated, however, that a more restricted definition of "franchise area" may be appropriate under limited circumstances, such as when an operator "has itself, through its own conduct, self-defined the areas to be served to such an extent that this redefined area accurately portrays the operator's 'franchise area'." *Id.* at 1181. Under this standard, the franchising authority has the burden of showing that the operator has made an "affirmative decision... to restrict service." *Id.*

[12] *First Recon. Order*, supra.

[13] 47 C.F.R. § 76.906.

[14] 47 C.F.R. § 76.911(b).

[15] *Third Recon. Order*, supra.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELE-MEDIA COMPANY OF
NORTH CAROLINA, L.P.

Petition for Reconsideration

of the Certification of
Rockingham County, NC
to Regulate Basic Cable Service Rates
(NC0516)

MEMORANDUM OPINION AND ORDER

Adopted: December 19, 1994; Released: December 20, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On December 17, 1993, Tele-Media Company of North Carolina, L.P. ("Tele-Media") filed a petition for reconsideration challenging the certification of Rockingham County, North Carolina ("the County") to regulate rates for basic cable service and associated equipment.[1] The County filed an opposition.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators that are not subject to effective competition.[2] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition, unless they have actual knowledge to the contrary.[3] Certification becomes effective 30 days from the date of filing unless the Commission finds that the franchising authority does not meet the statutory certification requirements.[4] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days from the date such certification becomes effective.[5] Rate regulation is automatically stayed pending review of a timely-filed petition for reconsideration alleging the presence of effective competition.[6]

II. DISCUSSION

3. Tele-Media argues that its cable system is subject to effective competition because it serves fewer than 30 percent of the households in its franchise area, an unincorporated portion of Rockingham County.[7] Specifically, Tele-Media states that it serves 1,320 of the 31,571 total "households" within its franchise area or 4.18 percent of the total number of "households" within the franchise area. Tele-Media asserts that it derived its household data from local census information and marketing data, but does not provide copies of the documentation relied upon or a citation to a verifiable source. Moreover, Tele-Media does not indicate how it is using the word "households." Pursuant to our rules, households refers to occupied housing units.[8] As supporting documentation, Tele-Media submits a declaration under penalty of perjury from a responsible official certifying the accuracy of the data in the petition. However, such a declaration with regard to information not within the personal knowledge or purview of the declaring party is not, standing alone, sufficient.

4. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[9] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's rules, is present within the franchise area.[10] Even if we reject the County's ar-

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[1] Rockingham County filed its "Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Lack of Effective Competition" ("FCC Form 328") on October 14, 1993. The certification became effective on November 13, 1993.

[2] Communications Act of 1934 § 623(a)(4); 47 U.S.C. § 543(a)(4).

[3] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[4] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt or administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, or the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition. 47 C.F.R. § 76.910(b). *See also* Communications Act of 1934 § 623(a)(4); 47 U.S.C. § 543(a)(4).

[5] 47 C.F.R. §§ 1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[6] 47 C.F.R. § 76.911(c).

[7] The 1992 Cable Act (Communications Act of 1934 § 623(a)(2); 47 U.S.C. § 543(a)(2)) and the Commission's rules (47 C.F.R. § 76.905(a)) provide that only the rates of cable systems that are not subject to effective competition may be regulated. One of the bases on which a cable system is deemed subject to effective competition is if fewer than 30 per cent of the households in the system's franchise area subscribe to the system's service. Communications Act of 1934 § 623(l)(1)(A); 47 U.S.C. § 543(l)(1)(A); 47 C.F.R. § 76.905(b)(1).

[8] *See Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (*"Third Recon. Order"*). As the Commission stated in the *Third Recon. Order*, "[a]s used in the Cable Act, we presume that Congress did not intend 'households' to have a different meaning than in the 1990 Census that would include vacant units or even partial year vacant units." *Third Recon. Order, supra*. The term "household" is defined for purposes of the 1990 Census data as "all the persons who occupy a housing unit." Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8. Thus, the term "households" reflects only occupied housing units.

[9] 47 C.F.R. § 76.906.

[10] 47 C.F.R. § 76.911(b)(1).

gument presented in its opposition,[11] we still must find that Tele-Media has failed to meet this burden. Tele-Media did not support its effective competition claim with adequate documentation. Our rules require the use of data reflecting the number of households (*i.e.*, occupied housing units) in the franchise area. Although Tele-Media's petition makes an assertion concerning the number of households in its franchise area, it does not submit sufficient information upon which to determine that its effective competition claim is based on the appropriate factual information required by our rules and it includes no documentation to support its claim other than a declaration from a company official. Accordingly, Tele-Media's petition is denied.[12]

III. ORDERING CLAUSES

5. Accordingly, IT IS ORDERED that the petition for reconsideration filed by Tele-Media of North Carolina, L.P. challenging the certification of Rockingham County, NC to regulate basic cable rates IS DENIED.

6. IT IS FURTHER ORDERED that the automatic stay imposed by Section 76.911(c) of the Commission's Rules, as amended, 47 C.F.R. § 76.911(c) IS TERMINATED.

7. IT IS FURTHER ORDERED that Tele-Media of North Carolina, L.P. SHALL FILE the required rate justifications on the applicable forms with Rockingham County, NC within thirty (30) days of the release date of this *Memorandum Opinion and Order* or within thirty (30) days of receipt of notice from Rockingham County that it is regulating Tele-Media's rates, whichever is later.

8. This action is taken pursuant to delegated authority pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[11] In its opposition, the County asserts that along with Tele-Media, another cable operator, Cablevision Industries, was granted a franchise to serve the same areas in rural Rockingham County. The County argues that the result has been that the two companies have chosen to operate in separate geographic regions of the franchise rather than to compete for the same customers in the same regions. Therefore, the County claims that Tele-Media and Cablevision Industries have, in effect, divided the franchise into two distinct *de facto* franchise areas. As a result, the County argues that Tele-Media has redefined its franchise area and is not subject to effective competition in that particular area. Specifically, the County argues that the area actually served by Tele-Media includes approximately 2,456 households in the franchise area. The County claims that Tele-Media's actual subscriber penetration level is 53.75 percent, well-above the 30 percent threshold for the low penetration test for effective competition, when Tele-Media's total number of subscribers (1,320) is compared to the number of households where service is actually available (2,456) from Tele-Media. Therefore, the County argues that Tele-Media's petition should be denied. In light of our decision denying Tele-Media's petition due to lack of sufficient evidence demonstrating effective competition, we find no need to address the merits of the County's argument at this time.

[12] Should Tele-Media wish to submit more specific information sufficient to demonstrate the presence of effective competition, it may submit such information by filing a petition for revocation pursuant to Section 76.914 of the Commission's rules. *See* 47 C.F.R. § 76.914(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

C-TEC CABLE SYSTEMS
OF MICHIGAN, INC.

Petition for Reconsideration

of the Certification of
Georgetown Charter Township, MI
to Regulate Basic Cable Rates
(MI1692)

MEMORANDUM OPINION AND ORDER

Adopted: December 19, 1994; Released: December 20, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On October 28, 1993, C-TEC Cable Systems of Michigan, Inc. ("C-TEC") filed a timely petition for reconsideration challenging the certification of Georgetown Charter Township ("Georgetown") to regulate rates for basic cable service and associated equipment.[1] C-TEC also filed a supplement to its petition pursuant to a recent Commission order.[2] Finally, pursuant to a Bureau request for clarification of previously filed pleadings, C-TEC filed a response on December 14, 1994. Georgetown did not file an opposition to C-TEC's petition.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators that are not subject to effective competition.[3] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition, unless they have actual knowledge to the contrary.[4] Certification becomes effective 30 days from the date of filing unless the Commission finds that the franchising authority does not meet the statutory certification requirements.[5] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days of the date such certification becomes effective.[6] Rate regulation is automatically stayed pending review of a timely-filed petition for reconsideration alleging the presence of effective competition.[7]

II. DISCUSSION

3. C-TEC argues that its cable system is subject to effective competition because it serves fewer than 30 percent of the households within Georgetown Township, its franchise area.[8] The supplement to C-TEC's petition shows that the cable system currently serves 11 of the 4,748 households (that is, occupied housing units)[9] in the franchise area, or 0.2 percent of the total number of households. As supporting documentation, C-TEC provides 1990 Census data[10] which indicates that there are 4,748 occupied housing units in the franchise area.[11] C-TEC also submits a computer print-out with sufficient subscriber information to show that it serves 11 households in the franchise area.

4. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[12] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's rules, is present within the franchise area.[13] C-TEC has met this burden. C-TEC

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[1] Georgetown filed its "Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Lack of Effective Competition" ("FCC Form 328") on October 4, 1993, which became effective on November 3, 1993.

[2] *Cable Operators' Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates*, 9 FCC Rcd 3656 (1994) (*"Effective Competition Order"*).

[3] Communications Act of 1934 § 623(a)(4), 47 U.S.C. § 543(a)(4).

[4] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[5] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, and the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition. 47 C.F.R. § 76.910(b). *See also*, 47 U.S.C. § 543(a)(4).

[6] 47 C.F.R. §§ 1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[7] 47 C.F.R. § 76.911(c).

[8] The 1992 Cable Act (Communications Act of 1934 § 623(a)(2), 47 U.S.C. § 543(a)(2) and the Commission rules (47 C.F.R. § 76.905(a)) provide that only the rates of cable systems that are not subject to effective competition may be regulated. One of the bases by which a cable operator will be deemed subject to effective competition is if fewer than 30 percent of the households in the system's franchise area subscribe to the cable service of a cable system. Communications Act of 1934 § 623(l)(1)(A), 47 U.S.C. § 543(l)(1)(A); 47 C.F.R. § 76.905(b)(1).

[9] As the Commission stated recently, "we presume that Congress did not intend 'households' to have a different meaning than in the 1990 Census that would include vacant units." *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (*"Third Recon. Order"*). The count of "households" in the 1990 Census reflects only occupied housing units. *See* Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8.

[10] As the Bureau has stated recently, the 1990 Census data is an appropriate source for household data. *Effective Competition Order, supra*.

[11] The census data provided indicates that there are 10,230 occupied housing units in Georgetown Township, and one subdivision (Jenison CDP) which accounts for 5,482 occupied housing units. C-TEC provides a chart in its December 14, 1994 response which attributes 4,748 occupied housing units to Georgetown township by apparently subtracting the total number of occupied housing units listed in the 1990 census for the subdivision.

[12] 47 C.F.R. § 76.906.

[13] 47 C.F.R. § 76.911(b)(1).

appropriately relied on data reflecting the number of households as required by our rules.[14] Relying on this data, C-TEC has submitted sufficient evidence demonstrating that its cable system serving Georgetown Charter Township, Michigan, its franchise area, serves 11 of the 4,748 households, or 0.2 percent of the households, within its franchise area. Thus, we find that C-TEC's system serving Georgetown Charter Township, Michigan is subject to effective competition. Accordingly, its petition is granted.

III. ORDERING CLAUSES

5. Accordingly, IT IS ORDERED that the petition for reconsideration filed by C-TEC Cable Systems of Michigan, Inc., challenging the certification of Georgetown Charter Township, Michigan to regulate basic cable rates IS GRANTED.

6. IT IS FURTHER ORDERED that the certification of Georgetown Charter Township, Michigan to regulate C-TEC Cable Systems of Michigan, Inc.'s basic cable service rates IS RESCINDED.

7. This action is taken pursuant to delegated authority pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[14] *Third Recon. Order, supra.*

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CVI OF ALABAMA
dba Cablevision Industries

Petition for Revocation

of the Certification of
Dothan, Alabama (AL0240)
to Regulate Basic Cable Service Rates

MEMORANDUM OPINION AND ORDER

Adopted: December 19, 1994; Released: December 20, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On March 10, 1994, CVI of Alabama, Inc. ("CVI") filed a petition for revocation challenging the certification of the City of Dothan, Alabama ("Dothan") to regulate rates for basic cable service and associated equipment.[1] In addition, in response to a Bureau request, CVI filed a supplement clarifying information filed in its petition. Dothan did not file an opposition to CVI's petition.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators that are not subject to effective competition.[2] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition, unless they have actual knowledge to the contrary.[3] Certification becomes effective 30 days from the date of filing unless the Commission finds that the franchising authority does not meet the statutory certification requirements.[4] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days from the date such certification becomes effective.[5] Rate regulation is automatically stayed pending review of a timely-filed petition for reconsideration alleging the presence of effective competition.[6] Once the 30-day period for filing petitions for reconsideration has elapsed, cable operators may challenge a franchising authority's certification by filing a petition for revocation. Regardless of its grounds, however, a petition for revocation does not automatically trigger a stay of the franchising authority's power to regulate basic rates.[7]

II. DISCUSSION

3. CVI argues that its cable system is subject to effective competition because it serves fewer than 30 percent of the households in Dothan, its franchise area.[8] Specifically, CVI claims that it serves only 4,729 of the 20,595 households (that is, occupied housing units)[9] in Dothan, or 23 percent of the total number of households. As supporting documentation, CVI provides 1990 Census data[10] which shows that there are 20,595 households in the City of Dothan. CVI also submits a computer print-out with sufficient subscriber information to support its claim that it serves 4,729 subscribers in the franchise area.

4. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[11] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's rules, is present within the franchise area.[12] CVI has met that burden. Specifically, CVI appropriately relied on data reflecting the number of households as required by our rules.[13] Relying on this data,

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[1] Dothan filed its "Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Effective Competition" ("FCC Form 328") on October 6, 1993, which became effective on November 5, 1993.

[2] Communications Act of 1934 § 623(a)(4), 47 U.S.C. § 543(a)(4).

[3] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[4] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt or administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, and the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition. 47 C.F.R. § 76.910(b). *See also* 47 U.S.C. § 543(a)(4).

[5] 47 C.F.R. §§ 1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[6] 47 C.F.R. § 76.911(c).

[7] 47 C.F.R. § 76.914

[8] The Cable Act (Communications Act of 1934 § 623(a)(2), 47 U.S.C. § 543(a)(2)) and the Commission's rules (47 C.F.R. § 76.905(a)) provide that only the rates of cable systems that are not subject to effective competition may be regulated. One of the bases by which a cable system will be deemed subject to effective competition is if fewer than 30 percent of the households in the system's franchise area subscribe to the system's cable service. Communications Act of 1934 § 623(l)(1)(A), 47 U.S.C. § 543(l)(1)(A); 47 C.F.R. § 76.905(b)(1).

[9] As the Commission stated recently, "we presume that Congress did not intend households' to have a different meaning than in the 1990 Census that would include vacant units." *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (*"Third Recon. Order"*). The count of "households" in the 1990 Census reflects only occupied housing units. *See* Bureau of the Census, 1990 Census of Population and Housing, Summary Population Characteristics, Alabama, 1990 CPH-1-2 Appendix B at B-8.

[10] As the Bureau has stated recently, the 1990 Census data is an appropriate source for household data. *Cable Operators' Petition for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates*, 9 FCC Rcd 3656 (1994).

[11] 47 C.F.R. § 76.906.

[12] 47 C.F.R. § 76.911(b)(1)

[13] *Third Recon. Order*, supra.

CVI has submitted sufficient evidence demonstrating that its cable system serving the City of Dothan, its franchise area, serves 4,729 of the 20,595 households, or 23 percent of the households. Thus, we find CVI's system serving the City of Dothan is subject to effective competition. Accordingly, its petition is granted.

III. ORDERING CLAUSES

5. Accordingly, IT IS ORDERED that the petition for revocation filed by CVI of Alabama challenging the certification of the City of Dothan to regulate basic cable rates IS GRANTED.

6. IT IS FURTHER ORDERED that the certification of the City of Dothan to regulate CVI's basic cable rates is RESCINDED.

7. This action is taken pursuant to delegated authority pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

BLUE RIDGE CABLE
TELEVISION, INC.

Petition for Reconsideration

of Certification of
Township of Heidelberg, PA
to Regulate Basic Cable Service Rates
(PA0742)

MEMORANDUM OPINION AND ORDER

Adopted: December 19, 1994; Released: December 20, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On March 25, 1994, Blue Ridge Cable Television, Inc. ("Blue Ridge") filed a timely petition for reconsideration challenging the certification of the Township of Heidelberg, Pennsylvania ("Township") to regulate rates for basic cable service and associated equipment.[1] On August 18, 1994, Blue Ridge submitted its supplemental pleading in response to the Commission's July 29, 1994 Order.[2] The Township did not file an opposition to Blue Ridge's Petition.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators that are not subject to effective competition.[3] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition, unless they have actual knowledge to the contrary.[4] Certification becomes effective 30 days from the date of filing unless the Commission finds that the franchising authority does not meet the statutory certification requirements.[5] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days from the date such certification becomes effective.[6] Rate regulation is automatically stayed pending review of a timely-filed petition for reconsideration alleging the presence of effective competition.[7]

II. DISCUSSION

Petitioner's Contentions

3. Blue Ridge bases its challenge on the competing provider test for effective competition set forth in the 1992 Cable Act and our rules.[8] Blue Ridge argues that its system serving the Township is subject to effective competition because its franchise area is: 1) served by itself and Twin County Trans Video, Inc. d/b/a Twin County Cable ("Twin County"), an unaffiliated multichannel video programming distributor ("MVPD") and that each of them offers comparable programming to at least 50 percent of the households in the franchise area; and 2) the number of households subscribing to Twin County, the smaller operator, exceeds 15 percent of the households in the franchise area.

4. Blue Ridge states that there are 1,089 "homes" in Heidelberg Township, the franchising area. Blue Ridge states that its cable system passes 800 of the 1,089 "homes," or 73 percent of the total number of "homes." In addition, Blue Ridge states that it serves 662 of the 1,089 "homes" or 60.8 percent of the total number of "homes." Blue Ridge submits 1990 Census information[9] applicable to the Township which indicates that there are 1,089 total "housing units" in Heidelberg Township.[10] In addition, Blue Ridge

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[1] The Township filed its "Certification of Franchising Authority to Regulate Basic Cable Service rates and Initial Finding of Lack of Effective Competition" on March 22, 1994, which became effective on April 21, 1994.

[2] *Cable Operator's Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates*, 9 FCC Rcd 3656 (1994) (*"Effective Competition Order"*).

[3] Communications Act of 1934 §623(a)(4), 47 U.S.C. §543(a)(4).

[4] 47 C.F.R. §§76.906, 76.910(b)(4).

[5] 47 C.F.R. §76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, or personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition. 47 C.F.R. §76.910(b). *See also* Communications Act of 1934 §623(a)(4), 47 U.S.C. §543(a)(4).

[6] 47 C.F.R. §§1.106, 76.911. *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993) (*"Rate Order"*).

[7] 47 C.F.R. §76.911(c).

[8] The 1992 Cable Act and the Commission's rules provide that only the rates of cable systems that are not subject to effective competition may be regulated. Communications Act of 1934 §623(a)(2), 47 U.S.C. §543(a)(2); 47 C.F.R. §76.905(a). One of the bases on which a cable system is deemed subject to effective competition is if the franchise area is: 1) served by at least two unaffiliated multichannel video programming distributors each of which offers comparable programming to at least 50 percent of the households in the franchise area; and 2) the number of households subscribing to multichannel video programming other than the largest multichannel video programming distributor exceeds 15 percent of the households in the franchise area. Communications Act of 1934 §623(l)(1)(B), 47 U.S.C. §543(l)(1)(B); 47 C.F.R. §76.905(b)(2).

[9] As the Commission stated in the *Effective Competition Order*, the 1990 Census is an appropriate source for household data. *Effective Competition Order, supra.*

[10] "Housing units" are not the same as "households," the term used in the Cable Act and the Commission's rules. The count of "households" in the 1990 Census reflects only occupied housing units. *See* Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8. "Housing units" reflect occupied and unoccupied units.

submits a revised Annual Report of Cable Television Systems (FCC Form 325) stating that it passes 800 homes in the franchise area. Blue Ridge further submits a copy of a computer printout with sufficient information to demonstrate that it serves 662 subscribers. Finally, Blue Ridge submits a copy of its channel guide which demonstrates that it provides 56 channels of programming, including at least 41 non-broadcast channels.[11]

5. With respect to Twin County, Blue Ridge states that Twin County passes 653 of the 1,089 "homes" or 60 percent of the total number of "homes" in the franchise area. In addition, it states that Twin County serves 225 of the 1,089 "homes," or 20.7 percent of the total number of "homes." As support, Blue Ridge submits a letter from Twin County, in which Twin County states that its cable system in Heidelberg passes 653 and serves 225 of the 1089 "homes."[12] In addition, Blue Ridge submits a copy of an advertisement listing Twin County's channel line-up, which demonstrates that Twin County offers 51 channels of video programming, including at least 32 non-broadcast channels.[13]

6. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[14] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's rules, is present within its franchise area.[15] Based on the totality of the evidence presented, we find that Blue Ridge has met this burden.

Disposition of Blue Ridge's Competitive Provider Effective Competition Claim

7. The first prong of the competitive providers test for effective competition requires that the franchise area be served by at least two unaffiliated MVPDs, each of which offers comparable programming to at least 50 percent of the households in the franchise area.[16] Blue Ridge asserts that it passes 73 percent of the 1,089 "homes" in the franchise area and that Twin County passes 60 percent of the 1,089 "homes" in the franchise area. The 1990 Census data submitted by Blue Ridge shows that there are 1,089 total housing units (i.e. occupied and unoccupied housing units), including 1,051 households (i.e. occupied housing units) in the franchise area. Thus, it is clear that the word "homes" as used by Blue Ridge refers to total housing units, not to households. Yet our rules require the number of households to be the reference point for purposes of gauging effective competition under this test, just as it is required under the low penetration test.[17] However, we recognize that determining the number of households (i.e. occupied housing units) which are passed by a cable operator, as opposed to the number which exist in the franchise area, may not be easily accomplished. Such information is not provided by the Census data we routinely urge operators to rely upon for purposes of the low penetration test, and we understand that such information may not generally be available to or collected by operators. Because we are concerned to identify franchise areas which are subject to effective competition between or among providers, we will examine the totality of the evidence submitted by Blue Ridge to see if conclusions can be drawn from it about the percentage of households passed by Blue Ridge and Twin County.

8. As stated earlier, the 1990 Census data submitted by Blue Ridge indicates that there are 1,089 total housing units and 1,051 households in the franchise area. Blue Ridge asserts that it actually serves 662 subscribers in the area.[18] Our calculations show that 662 subscribers represent 63 percent of the total households in the franchise area. Therefore, Blue Ridge clearly passes more than 50 percent of the households in the franchise area. Next, Blue Ridge submits a letter from Twin County stating that Twin County passes 653 "homes."[19] If we subtract the total number of households from the total number of housing units, we find that 38 housing units, or approximately 3.5 percent of total housing units, were unoccupied. If we reduce the number of "homes" passed by Twin County by 3.5 percent, we arrive at a rough household number of 630. This number is about 60 percent of the total households in the area. Alternatively, if we assume as a worst case that Twin County passes all of the unoccupied housing units in the franchise area, and so subtract 38 from 653, we are left with a total of 615 households passed, which is 58.5 percent of total households. Under either scenario, the evidence permits us to conclude that both Blue Ridge and Twin County pass more than 50 percent of the households in the franchise area.

9. With regard to the issue of programming comparability, we find that Blue Ridge has submitted sufficient evidence that the programming of the two operators are comparable. The channel lineups for both operators submitted by Blue Ridge establish that each operator offers over 50 channels with more than 30 non-broadcast channels -- this satisfies the Commission's programming comparability criteria.[20]

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[11] Competing MVPDs must offer comparable video programming to households in the franchise area. *See* 47 C.F.R. §76.905(b)(2). As the Commission has stated previously, in order to provide "comparable" video programming, a MVPD must provide at least 12 channels of video programming, including at least one non-broadcast channel. *See Rate Order*, at 5667.

[12] Section 76.911(b)(2) of the Commission's rules authorizes a cable operator to request from a competitor information regarding the competitor's reach and subscribership, and requires the competitor to respond. The response, however, may be limited to simply a statement of numerical totals. *See* 47 C.F.R. §76.911(b)(2).

[13] Blue Ridge also submits two advertisements for Twin County Cable in a local newspaper.

[14] 47 C.F.R. §76.906.

[15] 47 C.F.R. §76.911(b)(1).

[16] 47 C.F.R. §76.905(b)(2)(i).

[17] *See* Communications Act of 1934 §623(l)(1)(A), 47 U.S.C. §543(l)(1)(A); 47 C.F.R. §76.905(b)(1) (measuring low penetration effective competition by percentage of households subscribing to cable in the franchise area); Communications Act of 1934 §623(l)(1)(B), 47 U.S.C. §543(l)(1)(B); 47 C.F.R. §76.905(b)(2) (measuring competitive provider effective competition by percentage of households passed and percentage of households subscribing to cable in the franchise area).

[18] Blue Ridge submits a computer print-out with sufficient detail demonstrating that it serves 662 subscribers in Heidelberg Township, its franchise area.

[19] Twin County asserts in its letter to Blue Ridge that the figure of 653 "homes passed" was taken directly from Twin County's Form 325A filed with the Commission.

[20] *See* n.11, *supra*.

10. With regard to the second prong of the competitive providers effective competition test, we find that the evidence shows that more than 15 percent of the households in the franchise area subscribe to the multichannel video programming distributor other than from Blue Ridge, the largest MVPD.[21] Here, Blue Ridge has submitted sufficient evidence that Twin County, the smaller of the two competitors, serves 225 subscribers out of the 1,051 households, or 21.4 percent of total households.

11. As Blue Ridge has submitted sufficient evidence demonstrating that its cable system serving Heidelberg Township is subject to effective competition from another cable operator, its petition is granted.

III. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED that the Petition for Reconsideration filed by Blue Ridge Cable Television, Inc. challenging the Certification of the Township of Heidelberg, Pennsylvania IS GRANTED.

13. IT IS FURTHER ORDERED that the certification of the Township of Heidelberg, Pennsylvania to regulate the basic cable rates of Blue Ridge Cable Television, Inc. IS RESCINDED.

14. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules.[22]

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[21] As Blue Ridge serves 60 percent of the total number of households while Twin hhCounty serves 21.4 percent, it is clear that Blue Ridge is the largest of the two 7competitors.
[22] 47 C.F.R. §0.321.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NewChannels	CUID Nos. NY1029,
Corporation	NY1030, NY1031, NY1210,
Syracuse, New York	NY1369, NY1370,
	NY1617 and NY1618

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: December 19, 1994; Released: December 20, 1994

By the Chief, Cable Services Bureau:

INTRODUCTION

1. Here we consider complaints about the price NewChannels Corporation ("NewChannels") was charging for its cable programming service ("CPS") tier in CUID Nos. NY1029, NY1030, NY1031, NY1210, NY1369, NY1370, NY1617, NY1618. NewChannels has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This order addresses the reasonableness of NewChannels's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

PROCEDURAL MATTERS

4. The first CPS complaint was completed and served on NewChannels on January 3, 1994.[11] The Commission received the complaint on January 6, 1994.

5. NewChannels attempted to justify its CPS price through FCC Form 393's filed on February 14, 1994 for CUID Nos. NY1029, NY1030, NY1031, NY1210, NY1369, NY1617, NY1618 and on March 4, 1994 for NY1370. NewChannels amended its justification on June 24, 1994 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally,[12]

DISCUSSION

6. NewChannels asserts that its monthly CPS tier price of $11.25 per subscriber is justified by its benchmark filing because its price is equal to the maximum permitted charge of $11.25 as calculated in the filing. Upon review of NewChannels's Form 393, we have found no apparent errors that would require a recalculation of NewChannels's maximum permitted CPS price.

CONCLUSIONS

7. Upon review of the record herein, we conclude that NewChannels has demonstrated that $11.25 per month (plus franchise fee) was the maximum reasonable CPS tier price for the period October 18, 1993 to May 14, 1994.[13]

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent NewChannels has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration*, n.7 *infra*, the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which NewChannels implemented its CPS price under the new regulations. See para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*); 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration* at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189, n.195.

[11] The complaint was dated December 21, 1993 and states that it was mailed to NewChannels on that date. NewChannels has not complied with 47 C.F.R. § 76.956(a), which required it to state when service occurred. Under these circumstances we will consider the postmark date, January 3, 1994, as the service date.

[12] *Cable Operators' Rate Justification Filings*, DA 94-526 (released May 23, 1994).

[13] This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed

8. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints against the cable programming service price charged by NewChannels Corporation, CUID Nos. NY1029, NY1030, NY1031, NY1210, NY1369, NY1370, NY1617, NY1618, and all other complaints relating to the same price, ARE DENIED TO THE EXTENT INDICATED HEREIN.

9. IT IS FURTHER ORDERED, that the benchmark filing submitted by NewChannels Corporation with respect to CUID Nos. NY 1029, NY1030, NY1031, NY1210, NY1369, NY1370, NY1617, NY1618 and NY1029, for the period of October 18, 1993 to May 14, 1994, justifies a maximum price of $11.25 per month (plus franchise fee) for NewChannels, Corporation's cable programming service tier.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

herein. This finding is based solely on the representations of NewChannels listed in paragraph 5, *supra*, and the modifications described in paragraph 6, *supra*. Should information come to our attention that these representations (including representations as to data regarding installations and customer equipment) were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Dynamic Cablevision of Florida, Ltd. Hialeah, FL — LOI-93-43

Letter of Inquiry

MEMORANDUM OPINION AND ORDER

Adopted: December 18, 1994; Released: December 22, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On September 28, 1993, the Commission received an FCC Form 329 Complaint filed by Metropolitan Dade County concerning the reasonableness of rates charged for cable programming services by Dynamic Cablevision of Florida, Ltd. ("Dynamic"). In response to this complaint, the Commission issued Letter of Inquiry 93-43 ("LOI") to Dynamic on December 13, 1993.[1] The LOI asked Dynamic to provide information concerning its compliance with the Commission's rules governing evasion in the offering of packages which allegedly are not rate-regulated. Dynamic responded to our LOI on January 12, 1994.

II. BACKGROUND

2. In the Cable Television Consumer Protection and Competition Act of 1992 ("the 1992 Cable Act"), Congress created a regulatory scheme giving the Commission and local franchising authorities jurisdiction over the cable programming and equipment rates of non-competitive cable systems. The 1992 Cable Act provides that the rates of cable systems not subject to effective competition may be regulated by local franchising authorities, in the case of basic service, and by the Commission, in the case of cable programming services.[2] A stated policy of the 1992 Cable Act is to ensure that "consumer interests are protected in the receipt of cable service."[3]

3. The 1992 Cable Act requires cable operators to offer subscribers a basic tier that must contain at least all qualified local broadcast signals and, unless otherwise specified by the local franchising authority, public, educational, and governmental channels.[4] The Commission was charged by the 1992 Cable Act with creating regulations that ensure that the rates for the basic service tier are reasonable.[5] The 1992 Cable Act directs that "[s]uch regulations shall be designed to achieve the goal of protecting subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition."[6] Under the 1992 Cable Act, operators may offer other channels in a cable programming service tier or tiers.[7] The 1992 Cable Act orders the Commission to create regulations for the cable programming service tiers that allow it to identify individual cases of unreasonable rates.[8] The 1992 Cable Act thus protects consumers' interests in continuing to receive the basic service tier and cable programming service tiers at reasonable rates.

4. The 1992 Cable Act requires the Commission to adopt standards and guidelines to prevent evasions, "including evasions that result from retiering."[9] The 1992 Cable Act's legislative history states that the Commission should scrutinize offerings of non-traditional stand-alone services to "prevent repricing, retiering, or other alterations of rate structures" that could have the effect of evading the purposes of rate regulation.[10] This provision in the 1992 Cable Act is intended to give the Commission the authority to address changes in the cable industry's business practices that would thwart the intent of rate regulation.[11]

5. In the *Rate Order* the Commission defined evasion as "any practice or action which avoids the rate regulation provisions of the Cable Act or Commission rules contrary to the intent of the Act or its underlying policies."[12] We must scrutinize a particular operator's marketing or pricing practices to determine whether those practices have the effect of avoiding the requirements of our rate regulations, contrary to the intent of the 1992 Cable Act and our rules.

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[1] Letter from Roy J. Stewart, Chief, Mass Media Bureau, FCC, to Dynamic Cablevision of Florida, LOI-93-43 (December 13, 1993). Copies of the Letter of Inquiry and Response are available to the public in the FCC's Cable Reference Center, 2033 M Street, N.W., Room 333, Washington, D.C. We note that the Response appears to provide information about service in several areas. Our decisions herein will be made a part of the pending rate proceeding to which the Form 393 complaint that triggered this LOI relates as well as any other relevant rate proceedings which may be before us.

[2] Communications Act of 1934, as amended, § 623 (a)(2), 47 U.S.C. § 543 (a)(2) (1992).

[3] Pub. L. No. 102-385 § 2 (b) (4), 106 Stat. 1460 (1992); *see also* H.R. Rep. No. 628, 102d Cong., 2d Sess. at 34 (1992).

[4] Communications Act of 1934 § 623 (b)(7)(A)(ii-iii), 47 U.S.C. § 543 (b)(7)(A)(ii-iii) (1992); *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket 92-266, *Report and Order and Further Notice of Proposed Rulemaking*, 8 FCC Rcd 5631 at ¶ ¶ 157-161 (1993) (*"Rate Order"*) (franchising authorities may require operators to carry PEG channels on tiers other than basic).

[5] Communications Act of 1934 § 623 (b)(1), 47 U.S.C. § 543 (b)(1) (1992).

[6] *Id.*

[7] Communications Act of 1934 § 623(l)(2), 47 U.S.C. § 543(l)(2) (1992).

[8] Communications Act of 1934 § 623 (c)(1)(A), 47 U.S.C. § 543 (c)(1)(A) (1992). Identification of individual cases of unreasonable rates is achieved by a process in which the Commission assumes jurisdiction over systems where a complaint about a cable programming service tier rate is filed.

[9] Communications Act of 1934 § 623(h), 47 U.S.C. § 543(h) (1992).

[10] H.R. Rep. No. 628 at 79.

[11] S. Rep. No. 92, 102d Cong., 2d Sess. at 77 (1992).

[12] *Rate Order* ¶ 451.

III. FACTS

6. Before September 1, 1993, Dynamic's services[13] included a 20 channel basic tier for $17.95 per month, an 18 channel cable programming service tier, called Basic Plus, for $3.95 per month, and a 6 channel cable programming services tier, called Cable Plus (consisting of the Sci-Fi Channel, Sunshine Network, SportsChannel, Cartoon Network, Bravo, Comedy Central), for $4.95 per month. Two of the channels in the Cable Plus offering (the Sunshine Network and SportsChannel) were also available to customers on an individual basis. The following chart summarizes Dynamic's service tier options before September 1, 1993:

Offering	Channels	Price
1. Basic	20	$17.95
2. Basic Plus	18	$ 3.95
3. Cable Plus	6 (incl. 2 individual channels)	$ 4.95
TOTAL	44	$26.85

7. Beginning September 1, 1993, the date our rate regulations became effective, Dynamic offered a 28 channel basic tier, called Lifeline, for $12.34 per month; a 13 channel cable programming services tier, called Basic, for $5.94 per month; the same Cable Plus package it had previously offered for the same price; and a four channel package composed of TNT, WTBS, WOR, and CMT, called Expanded Package, for $.97 per month. All of the channels in the Expanded Package were channels previously offered on the Basic Plus tier. As of September 1, 1993, each of the channels that comprised the Cable Plus package were also offered on an individual basis at $1.25 per channel, and each of the channels that comprised the new Expanded Package were also offered on an individual basis at $.45 per channel.

8. The following chart summarizes Dynamic's service tier options as of the date of its response to our LOI:

Offering	Channels	Price
1. Lifeline	28	$12.34
2. Basic	13	$ 5.94
3. Cable Plus	6	$4.95 or $1.25 per channel
4. Expanded Package	4	$.97 or $.45 per channel
TOTAL	51	$24.20 (if purchased packages)

9. Dynamic argues, *inter alia*, that it began offering all of its Cable Plus channels individually, as well as TNT, TBS, WOR and CMT individually and through its Expanded Package, in order to implement Congress' intent to maximize consumer choice. However, based on this record, very few consumers elected to exercise choice. Dynamic's response provides a breakdown of its subscribers who chose to take the packages and the individual channels.[14] While as of December 31, 1993, 16,381 subscribers elected to take the Cable Plus package, the numbers of subscribers taking the individual channels comprising that package are as follows: The Cartoon Network-500; The Sunshine Network-460; Sportschannel Florida-263; Sci-Fi Channel-233; Bravo-119; Comedy Central-72. With respect to the Expanded Package, as of December 31, 1993, 72,761 subscribers took the entire package while 17 subscribers took TNT, 9 took WTBS, 7 took WOR, and 2 took Country Music Television.

IV. DISCUSSION

10. The 1992 Cable Act requires the Commission to adopt standards and guidelines to prevent evasions, "including evasions that result from retiering."[15] An evasion, as defined by the Commission, is an act or practice that "avoids the rate regulation provisions of the [Cable] Act or our rules contrary to the intent of the Act or its underlying policies."[16] In the *Rate Order*, we stated that "retiering otherwise permitted under our rules will not be deemed an evasion."[17] First, we examine whether Dynamic's response to the LOI shows that its restructuring of its offerings had the effect of evading rate regulation for the channels that Congress intended to be rate-regulated.

11. Dynamic's restructuring effective September 1, 1993, involved offering of all the channels in its Cable Plus service on an individual basis, and moving 4 channels (TNT, WTBS, WOR and CMT) from its 18 channel Basic Plus tier, to create the packages it alleges are not rate-regulated. With respect to the Cable Plus service, Dynamic's offering of the component channels on an individual basis purportedly removed the Cable Plus service from rate regulation. As to the Expanded Package, Dynamic removed channels from an otherwise rate-regulated tier to create a new package of channels. Dynamic fundamentally changed its service to subscribers by removing 10 channels from rate regulation and by eliminating an entire cable programming service tier. In so doing, Dynamic avoided application of our rate regulations which generally required cable operators to reduce rates by about 10 percent. That is, if Dynamic had not restructured on September 1, 1993, it would have been required to recalculate its rates in accordance with the *Rate Order* we released on May 3, 1993, which generally required cable operators to reduce their rates. Moreover, customers that were receiving the Cable Plus service and the four channels comprising the Expanded Package apparently continued to receive them after the restructuring, and there appears to be no sufficient justification for Dynamic's restructuring other than to avoid rate regulation.

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[13] Dynamic's Response appears to provide information relating to a number of different service areas (Hialeah, Hialeah Gardens, Medley, Coral Gables, West Miami, Sweetwater and surrounding areas of unincorporated Dade County, Miami Springs, Virginia Gardens and the Doral area of unincorporated Dade County). The information in the Response appears to be generally the same, with respect to its service offerings, for the service areas in all material respects for purposes of the analysis in this decision. The Form 329 complaint which triggered this LOI bears a CUID number of FL0202 which is the identification number relating to the City of Hialeah, and the information set forth herein, except where noted, is information concerning service in Hialeah. This decision applies equally to Dynamic's service in the other service areas referred to in its response.

[14] Dynamic did not indicate what service areas are covered by this data.

[15] Communications Act of 1934 § 623 (h), 47 U.S.C. § 543 (h) (1992).

[16] *Rate Order* ¶ 451.

[17] *Id.* at ¶ 453.

12. We believe that Dynamic has not provided a sufficient justification for this change to overcome our finding that there is an evasion of rate regulation. To the contrary, virtually all of Dynamic's subscribers to its former tiers were given the package of channels from those tiers. (Few subscribers actually subscribed to individual channels instead of either of the packages offered; at most, at the time of Dynamic's LOI response, only 9 percent of Dynamic's subscribers who took any part of the Cable Plus package took the individual channels, while significantly less than one percent of subscribers who took any part of the Expanded Package took the individual channels). Other than an attempt to evade rate regulation, there appears to be no sufficient justification for this restructuring.

13. Other factors corroborate our finding that Dynamic's restructuring had the effect of evading rate regulation. First, it made all of the Cable Plus channels available individually and on a package basis, thereby entirely eliminating a cable programming service tier, and it offered the Expanded Package, all on the eve of regulation. Second, it appears that it automatically subscribed existing Cable Plus customers to the September 1, 1993 Cable Plus package and its former Basic Plus customers to the Expanded Package. In light of these facts, it appears that Dynamic's restructuring of its offerings may have evaded rate regulation.

14. Because Dynamic's restructuring is a purported collective offering of a la carte channels, we also must determine whether the offering met the Commission's requirements for a permissible collective offering of a la carte channels. If the offering met the Commission's requirements for a permissible collective offering of a la carte channels, then Dynamic would not have evaded our rate regulations because it would not have been required to reduce its price for the collective a la carte package.[18]

15. In our *Rate Order*, the Commission recognized that "a la carte packages" appear to be "cable programming services," but said that "interpreting the statute in such a literal fashion could disadvantage consumers by denying them discounts on packages of per-channel or per-program services and by limiting subscriber access to a greater quantity of premium programming."[19] Thus, we envisioned that cable operators, for the most part, would offer channels that previously had been offered a la carte in discounted packages, and concluded that it would be better for consumers if we construed the 1992 Cable Act to permit such discounting.[20] This is not the type of offering that Dynamic and others have provided their subscribers. Specifically, these operators did not offer a discounted package of channels that previously had been offered a la carte to subscribers, but instead removed channels from a tier that would be subject to our rate regulations.

16. Moreover, in the *Rate Order*, the Commission determined that a la carte packages would be exempt from rate regulation, i.e., would be deemed not to fall within the definition of "cable programming service," if two conditions were met: (1) the price for the combined package must not exceed the sum of the individual charges for each component service; and (2) the cable operator must continue to provide the component parts of the package to subscribers separately in addition to the package. The Commission said that the second condition would be satisfied only when "the per channel offering provides consumers with a realistic service choice."[21]

17. Under the two-part test that we set forth in the *Rate Order*, it is clear, first, that the prices for the two combined packages do not exceed the sum of the individual channel charges for the two packages, because subscribers may purchase, with respect to the Cable Plus service, each channel for $1.25 or the package for $4.95, and with respect to the Expanded Package, each channel for $.45 or the package for $.97. The second part of the test is whether the separate parts of the packages constitute a "realistic service offering." The results of our review of Dynamic's submission reveal that approximately 91 percent of the subscribers who take any part of the Cable Plus service take the whole package, and that while 72,761 customers take the Expanded Package, no more than 17 take any of the individual channels. These facts, together with the other factors present in this case,[22] tends to show that the per-channel offerings, in this instance, do not constitute realistic service offerings.

18. Even if we were to apply the 15 interpretive guidelines set forth in our *Second Reconsideration Order*, we still would conclude that Dynamic's offerings do not constitute a realistic service offering. Dynamic's submission reveals additionalevidence weighing against a finding that its individual a la carte channels constitute a realistic service offering. The most important factor, of course, is that as part of its restructuring "an entire regulated tier has been

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[18] In our *Going Forward Order*, we have reconsidered our regulatory treatment of collective offerings of a la carte channels. *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking*, MM Docket Nos. 92-266 and 93-215, FCC 94-286 (adopted November 10, 1994) *("Going Forward Order")*. Specifically, we have determined that such packages are cable programming service tiers within the meaning of Section 3(l)(2) of the 1992 Cable Act and therefore generally will be subject to our rate regulation rules. However, in order to determine whether Dynamic evaded rate regulation when it restructured its offering, we must evaluate its a la carte package under the rules that were in effect when it restructured.

[19] *Rate Order* ¶ 329.

[20] *See, e.g., Rate Order* at ¶ 453 n.1161 ("There is no evidence that operators would or, as a business matter, could shift programming previously offered as part of a tier to 'a la carte' status, *i.e.*, a per-channel or per-program offering, to avoid the rate regulation applicable to tiers").

[21] *Id.* at ¶ ¶ 327-28 & n.808. In the *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket No. 92-266, *Second Order on Reconsideration, Fourth Report & Order, and Fifth Notice of Proposed Rulemaking*, 9 FCC Rcd 4119 (1994) (*"Second Reconsideration Order"*), the Commission affirmed its prior view. It said that "we continue to believe that the public interest will be served by generally permitting non-regulated treatment of collective offerings of 'a la carte' channels if the offering enhances consumer choice and does not constitute an evasion of rate regulation." *Id.* at ¶ 194. In this regard, we retained the two-part test contained in the *Rate Order* for determining when we would refrain from regulating "a la carte packages." In addition, the Commission set out 15 interpretive guidelines to enable operators to better determine what collective offerings of "a la carte" channels will be considered "realistic service offerings." *Id.* at ¶ 195.

[22] *See* ¶ ¶ 10-12, *supra*.

eliminated and turned into an 'a la carte' package."[23] Moreover, a "significant percentage" of channels in the packages "were removed from regulated tiers," which would "weigh against unregulated treatment."[24] In this case, 100 percent of the channels in the packages were removed from a regulated tier.

19. In our recently adopted *Going Forward Order*, we have reconsidered our rules relating to a la carte packages and concluded that such packages are cable programming service tiers, within the meaning of Section 3(l)(2) of the 1992 Cable Act. In reaching this conclusion, we acknowledged that as applied to many fact patterns, we "did not provide a clear test for determining whether an a la carte package was permissible."[25]

20. We do not believe, however, that our a la carte rules are unclear as applied to the fact pattern at issue in this case. In the *Rate Order* we stated that a cable operator could not escape rate regulation simply by calling what otherwise would be a rate-regulated tier an a la carte package.[26] We reiterated this admonition in the *Second Reconsideration Order* when we warned against eliminating "an entire regulated tier" and "turning [it] into an a la carte package."[27] This, however, is exactly what Dynamic did by moving a total of ten channels to allegedly unregulated packages and in the process, eliminating an entire cable programming service tier. While we have acknowledged that aspects of our evaluation of a la carte packages were unclear,[28] as applied to these particular facts, this prong of the test is clear and requires no additional guidance or explanation from the Commission. In light of the fact that it is clear that elimination of an entire regulated tier and transformation of that tier into an a la carte package is an evasion of rate regulation, we find that Dynamic's retiering in fact clearly constitutes just such an evasion.

21. We find that Dynamic's Cable Plus and Expanded packages, as the offerings existed in Hialeah, Florida on December 13, 1993, the date of our LOI, must be treated as rate-regulated cable programming service tiers. As a result, effective 90 days from the release date of this Order, Dynamic must either offer the channels in these packages as part of the respective rate-regulated tiers from which they came or offer the channels collectively as a separate rate-regulated tier or tiers of cable programming service.[29] We further conclude that these packages are rate-regulated offerings as of September 1, 1993, and that the channels composing them must be counted as rate-regulated channels for purposes of rate justification as of that date.

V. ORDERING CLAUSES

22. Accordingly, IT IS ORDERED that Dynamic's packages are subject to rate regulation as of September 1, 1993, and the channels composing them must be counted by Dynamic as rate-regulated channels for purposes of rate justification, as of that date.

23. IT IS FURTHER ORDERED that, effective 90 days from the release date of this Order, Dynamic must either offer these channels as part of the respective rate-regulated tiers from which they came or offer the channels collectively as a separate rate-regulated tier or tiers of cable programming service.

24. IT IS FURTHER ORDERED that this Order is EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[23] *Second Reconsideration Order* at ¶ 196.

[24] *Id.*

[25] In adopting the 15 interpretive guidelines in the *Second Reconsideration Order* to supplement the *Rate Order's* two-prong test, we hoped to enable operators to better determine what collective offerings of a la carte channels would be considered an evasion of rate regulation. *See Going Forward Order* (adopted November 10, 1994).

[26] *Rate Order* ¶ 328 n.808.

[27] *Second Reconsideration Order* ¶ 196.

[28] *See Warner Cable Communications*, Milwaukee, Wisconsin, LOI-93-14, DA 94-1276 (released November 18, 1994).

[29] To provide 90 days gives Dynamic ample time to comply with the 30 day notice provisions of our regulations for rate and programming changes. *See* 47 C.F.R. §§ 76.309(c)(3)(i)(B), 76.932 and 76.964. Dynamic, of course, may continue to offer any channels as single channel offerings consistent with the 1992 Cable Act and our rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Cablevision of Boston Limited Partnership — LOI 93-12

Letter of Inquiry

MEMORANDUM OPINION AND ORDER

Adopted: December 18, 1994; Released: December 22, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. The Commission received a letter from the Office of Cable Communications of the City of Boston, Massachusetts to Cablevision of Boston ("Cablevision") dated September 9, 1993, alleging that Cablevision violated Commission regulations governing cable television service. In response to this complaint, the Commission issued Letter of Inquiry 93-12 ("LOI") to Cablevision on November 17, 1993.[1] The LOI asked Cablevision to provide information concerning, among other issues, its compliance with the Commission's rules governing rate and service changes for regulated cable services.[2] Cablevision responded to our LOI by letter dated December 16, 1993.

II. BACKGROUND

2. In the Cable Television Consumer Protection and Competition Act of 1992 ("the 1992 Cable Act"), Congress created a regulatory scheme giving the Commission and local franchising authorities jurisdiction over the cable programming and equipment rates of non-competitive cable systems. The 1992 Cable Act provides that the rates of cable systems not subject to effective competition may be regulated by local franchising authorities, in the case of basic service, and by the Commission, in the case of cable programming service.[3] A stated policy of the 1992 Cable Act is to ensure that "consumer interests are protected in the receipt of cable service."[4]

3. The 1992 Cable Act requires cable operators to offer subscribers a basic tier that must contain at least all qualified local broadcast signals and, unless otherwise specified by the local franchising authority, public, educational, and governmental channels.[5] The Commission was charged by the 1992 Cable Act with creating regulations that ensure that the rates for the basic service tier are reasonable.[6] The 1992 Cable Act directs that "[s]uch regulations shall be designed to achieve the goal of protecting subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition."[7] Under the 1992 Cable Act, operators may offer other channels in a cable programming service tier or tiers.[8] The 1992 Cable Act orders the Commission to create regulations for the cable programming service tiers that allow it to identify individual cases of unreasonable rates.[9] The 1992 Cable Act thus protects consumers' interests in continuing to receive the basic service tier and cable programming service tiers at reasonable rates.

4. The 1992 Cable Act requires the Commission to adopt standards and guidelines to prevent evasions, "including evasions that result from retiering."[10] The 1992 Cable Act's legislative history states that the Commission should scrutinize offerings of non-traditional stand-alone services to "prevent repricing, retiering, or other alterations of rate structures" that could have the effect of evading the pur-

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[1] Letter from Roy J. Stewart, Chief, Mass Media Bureau, FCC, to Henry J. Ferris, General Manager, Cablevision of Boston, LOI 93-12 (November 17, 1993). Copies of the Letter of Inquiry and Response are available to the public in the FCC's Cable Reference Center, 2033 M Street, N.W., Room 333, Washington, D.C. We note that there is a pending rate complaint proceeding involving Cablevision. Our decisions made herein will be made a part of that proceeding.

[2] The LOI also requested information concerning proper notice of rate increases and programming changes provided by Cablevision, and its compliance with regulations governing the *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket 92-266, *Order*, 8 FCC Rcd 2921 (1993) (*"Rate Freeze Order"*), *clarified*, 8 FCC Rcd 2917, 58 FR 21929 (April 26, 1993); *extended*, FCC 93-304 (released June 15, 1993), 58 FR 33560 (June 18, 1993), *Erratum*, 8 FCC Rcd 4511 (1993); *extended*, FCC 93-494 (released November 10, 1993), 58 FR 60141 (November 15, 1993); *extended*, 9 FCC Rcd 1299, 59 FR 6901 (February 14, 1994). This Order addresses only the regulatory status of the package. Other issues in the LOI will be dealt with subsequently.

[3] Communications Act of 1934, as amended, § 623 (a)(2), 47 U.S.C. § 543 (a)(2) (1992).

[4] Pub. L. No. 102-385 § 2 (b) (4), 106 Stat. 1460 (1992); *see also* H.R. Rep. No. 628, 102d Cong., 2d Sess. at 34 (1992).

[5] Communications Act of 1934 § 623 (b)(7)(A)(ii-iii), 47 U.S.C. § 543 (b)(7)(A)(ii-iii) (1992); *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket 92-266, *Report and Order and Further Notice of Proposed Rulemaking*, 8 FCC Rcd 5631 at ¶ ¶ 157-161 (1993) (*"Rate Order"*) (franchising authorities may require operators to carry PEG channels on tiers other than basic).

[6] Communications Act of 1934 § 623 (b)(1), 47 U.S.C. § 543 (b)(1) (1992).

[7] *Id.*

[8] Communications Act of 1934 § 623(l)(2), 47 U.S.C. § 543(l)(2) (1992).

[9] Communications Act of 1934 § 623 (c)(1)(A), 47 U.S.C. § 543 (c)(1)(A) (1992). Identification of individual cases of unreasonable rates is achieved by a process in which the Commission assumes jurisdiction over systems where a complaint about a cable programming service tier rate is filed.

[10] Communications Act of 1934 § 623(h), 47 U.S.C. § 543(h) (1992).

poses of rate regulation.[11] This provision in the 1992 Cable Act is intended to give the Commission the authority to address changes in the cable industry's business practices that would thwart the intent of rate regulation.[12]

5. In the *Rate Order* the Commission defined evasion as "any practice or action which avoids the rate regulation provisions of the Cable Act or Commission rules contrary to the intent of the Act or its underlying policies."[13] We must scrutinize a particular operator's marketing or pricing practices to determine whether those practices have the effect of avoiding the requirements of our rate regulations, contrary to the intent of the 1992 Cable Act and our rules.

III. FACTS

6. Before September 1, 1993, Cablevision's services included a 19 channel basic tier, for $9.95 per month, a 33 channel cable programming service tier, called Metro, for $10.50 per month, and a 12 channel cable programming service tier, called Family for $7.50 per month.[14]

7. The following chart summarizes Cablevision's service tier offerings prior to September 1, 1993:

Offering	Channels	Price
1. Basic	19	$ 9.95
2. Metro	33	$10.50
3. Family	12	$ 7.50
Total	64	$27.95

8. On September 1, 1993, the date our rate regulations became effective, Cablevision restructured its service offerings. Cablevision's restructured service offerings included an 18 channel basic tier, for $7.52 per month, and a 33 channel cable programming service tier, called Metro, for $13.58 per month. It also began offering its former Family cable programming service tier on an individual basis for $1.95 per channel per month.[15] The 12 channels were also offered together as a package, called Family Cable for $6.64 per month. It appears that Cablevision's subscribers to the Family tier may have automatically received the new Family Cable package. In addition, Cablevision removed SportsChannel New England from the Metro tier and offered the channel individually as an a la carte service for $0.21 per month.

9. The following chart summarizes Cablevision's service tier options as of the date of its response to our LOI:[16]

Offering	Channels	Price
1. Basic	18	$ 7.52
2. Metro	33	$13.58
3. Family Cable	12	$ 6.64
4. SportsChannel New England	1	$ 0.21
Total	64	$27.95

10. Cablevision argues, *inter alia*, that it began offering the services on its Family tier individually in order to maximize consumer choice. However, based on this record, relatively few consumers elected to exercise choice of the individual channels. As of December 16, 1994, Cablevision's Response indicates that 95,947 of its 119,112 customers receive the Family Cable package, while only 123 subscribers purchase one or more of the individual channels.[17] Based on these figures, less than 0.1 percent of Cablevision's customers elected to subscribe to individual channels, indicating that essentially no one considered that they had a "realistic choice."

IV. DISCUSSION

11. The 1992 Cable Act requires the Commission to adopt standards and guidelines to prevent evasions, "including evasions that result from retiering."[18] An evasion, as defined by the Commission, is an act or practice that "avoids the rate regulation provisions of the [Cable] Act or our rules contrary to the intent of the Act or its underlying policies."[19] In the *Rate Order*, we stated that "retiering otherwise permitted under our rules will not be deemed an evasion."[20] First, we examine whether Cablevision's response to the LOI shows that its restructuring of its offerings had the effect of evading rateregulation for the channels that Congress intended to be rate-regulated.

12. The table of Cablevision's service tier options as of the date of our LOI set out in paragraph 9 above almost mirrors the table in paragraph 7 that shows its service tier offerings prior to restructuring. Both before and after restructuring its service offerings Cablevision offered its subscribers a 33 channel cable programming service tier. In addition, Cablevision's Basic tier before restructuring was 19 channels, whereas after restructuring, the only difference was that Cablevision removed one channel from its Basic tier (Swap and Shop). Furthermore, Cablevision offered a second cable programming service tier consisting of 12 channels; that tier essentially became the 12 channel package offered after restructuring.[21] However, a significant

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[11] H.R. Rep. No. 628 at 79.

[12] S. Rep. No. 92, 102d Cong., 2d Sess. at 77 (1992).

[13] *Rate Order* ¶ 451.

[14] Cablevision states that it uses two separate trunks, designated as "A" and "B" trunks to deliver its programming services. Basic and Metro were delivered on the "A" trunk and Family was delivered on the "B" trunk.

[15] Cablevision states that, in addition to offering certain channels from the former Family cable programming service tier individually and as an a la carte package, Cablevision rearranged certain services as follows: MTV, HSN-2, and QVC 1 and 2 were moved from the Family tier to Metro; Trinity Broadcasting, Weather Radar Boston, and Ad Watch Classified were moved from Metro to Family Cable; and Swap and Shop was moved from Basic to Family Cable.

[16] This Order does not evaluate Cablevision's rates for its basic and cable programming service tiers. These rates are subject to review by the local franchising authority and the Commission in separate proceedings.

[17] In addition, 23,673 subscribers purchase Sportschannel New England, which is only offered on an individual basis.

[18] Communications Act of 1934 § 623(h), 47 U.S.C. § 543(h) (1992).

[19] *Rate Order* ¶ 451.

[20] *Id.* at ¶ 453.

[21] In creating the Family Cable a la carte package, Cablevision also rearranged certain services. *See* fn.15, *supra*.

difference is not reflected at all in the charts: the 12 channel Family Cable package offered after restructuring is offered as a tier of service whose prices would not be subject to rate regulation. Cablevision fundamentally changed its service to subscribers by removing 12 channels from rate regulation, thereby eliminating an entire cable programming service tier. In so doing, Cablevision avoided application of our rate regulations which generally required cable operators to reduce rates by about 10 percent (and denied the over 80 percent of its customers who received the package the benefit of the reduced price to which rate regulation entitled them). That is, if Cablevision had not restructured on September 1, 1993, it would have been required to recalculate its rates in accordance with the *Order* we released on May 3, 1993, which generally required cable operators to reduce their rates.

13. We believe that Cablevision has not provided a sufficient justification for this change to overcome our finding that there is an evasion of rate regulation. To the contrary, virtually all of Cablevision's subscribers to its former cable programming service tier were given the Family Cable package. (Few subscribers actually subscribed to individual channels instead of the Family Cable package; at most, significantly less than one percent of Cablevision's subscribers subscribed to individual channels). Other than an attempt to evade rate regulation, there appears to be no sufficient justification for this restructuring.

14. Other factors corroborate our finding that Cablevision's restructuring had the effect of evading rate regulation. First, Cablevision discontinued its Family cable programming service tier entirely and moved 8 of the 12 the channels comprising it plus 4 other channels removed from regulated tiers, to create the new Family Cable package on the eve of regulation. Second, it appears as if Cablevision may have automatically subscribed its existing Family customers to the September 1, 1993 Family Cable package. In light of these facts, we find that Cablevision's restructuring of its offerings constituted an evasion of our rate regulation rules.

15. Because Cablevision's restructuring is a purported collective offering of a la carte channels, we also must determine whether the offering met the Commission's requirements for a permissible collective offering of a la carte channels. If the offering met the Commission's requirements for a permissible collective offering of a la carte channels, then Cablevision would not have evaded our rate regulations because it would not have been required to reduce its price for the collective a la carte package.[22]

16. In our *Rate Order*, the Commission recognized that "a la carte packages" appear to be "cable programming services," but said that "interpreting the statute in such a literal fashion could disadvantage consumers by denying them discounts on packages of per-channel or per-program services and by limiting subscriber access to a greater quantity of premium programming."[23] Thus, we envisioned that cable operators, for the most part, would offer channels that previously had been offered a la carte in discounted packages, and concluded that it would be better for consumers if we construed the 1992 Cable Act to permit such discounting.[24] This is not the type of offering that Cablevision and others have provided their subscribers. Specifically, these operators did not offer a discounted package of channels that previously had been offered a la carte to subscribers, but instead removed channels from a tier that would be subject to our rate regulations.

17. Moreover, in the *Rate Order*, the Commission determined that such a la carte packages would be exempt from rate regulation, i.e., would be deemed not to fall within the definition of "cable programming service," if two conditions were met: (1) the price for the combined package must not exceed the sum of the individual charges for each component service; and (2) the cable operator must continue to provide the component parts of the package to subscribers separately in addition to the package. The Commission said that the second condition would be satisfied only when "the per channel offering provides consumers with a realistic service choice."[25]

18. Under the two-part test that we set forth in the *Rate Order*, it is clear, first, that the price for the combined package does not exceed the sum of the individual charges for the 12 services, because the price for the individual channels is $1.95 each, in contrast to the package price of $6.64. The second part of the test is whether the separate parts of the package constitute a "realistic service offering." Our review of Cablevision's submission reveal that more than 99 percent of the subscribers did not choose to subscribe to individual "a la carte" channels.[26] This fact, to-

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[22] In our *Going Forward Order*, we have reconsidered our regulatory treatment of collective offerings of a la carte channels. *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking*, MM Docket Nos. 92-266 and 93-215, FCC 94-286 (adopted November 10, 1994) *("Going Forward Order")*. Specifically, we have determined that such packages are cable programming service tiers within the meaning of Section 3(l)(2) of the 1992 Cable Act and therefore generally will be subject to our rate regulation rules. However, in order to determine whether Cablevision evaded rate regulation when it restructured its offering, we must evaluate its a la carte package under the rules that were in effect when it restructured.

[23] *Rate Order* ¶ 329.

[24] *See, e.g., Rate Order* ¶ 453 n.1161 ("There is no evidence that operators would or, as a business matter, could shift programming previously offered as part of a tier to 'a la carte' status, *i.e.*, a per-channel or per-program offering, to avoid the rate regulation applicable to tiers").

[25] *Id.* at ¶ ¶ 327-28 & n.808. In the *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket No. 92-266, *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, 9 FCC Rcd 4119 (1994) *("Second Reconsideration Order")*, the Commission affirmed its prior view. It said that "we continue to believe that the public interest will be served by generally permitting non-regulated treatment of collective offerings of 'a la carte' channels if the offering enhances consumer choice and does not constitute an evasion of rate regulation." *Id.* at ¶ 194. In this regard, we retained the two-part test contained in the *Rate Order* for determining when we would refrain from regulating "a la carte packages." In addition, the Commission set out 15 guidelines to enable operators to better determine what collective offerings of "a la carte" channels will be considered "realistic service offerings." *Id.* at ¶ 195.

[26] *See* ¶ 10, *supra*.

gether with the other factors present in this case,[27] tends to show, in this instance, that the per-channel offering does not constitute a realistic service offering.

19. Even if we were to apply the 15 interpretative guidelines set forth in our *Second Reconsideration Order*,[28] we still would conclude that Cablevision's offering does not constitute arealistic service offering. Cablevision's submission reveals additional evidence weighing against a finding that its individual a la carte channels constitute a realistic service offering. The most important factor, of course, is that "an entire regulated tier has been eliminated and turned into an 'a la carte' package."[29] Moreover, a "significant percentage" of channels in the package "were removed from regulated tiers," which would "weigh against unregulated treatment."[30] In this case, 100 percent of the channels in the package were removed from regulated tiers.

20. In our recently adopted *Going Forward Order*, we have reconsidered our rules relating to a la carte packages and concluded that such packages are cable programming service tiers within the meaning of Section 3(l)(2) of the 1992 Cable Act. For that reason, the package at issue is subject to rate regulation and cannot continue to be treated as an unregulated package of channels. In reaching this conclusion in the *Going Forward Order*, we acknowledged that, as applied to many fact patterns, we did not provide a clear test in the *Rate Order* and the *Second Reconsideration Order* for determining whether an a la carte package was permissible.

21. We do not believe, however, that our a la carte rules are unclear as applied to the fact pattern at issue in this case. In the *Rate Order* we stated that a cable operator could not escape rate regulation simply by calling what otherwise would be a rate-regulated tier an a la carte package.[31] We reiterated this admonition in the *Second Reconsideration Order* when we warned against eliminating "an entire regulated tier" and "turning [it] into an a la carte package."[32] This, however, is exactly what Cablevision did by moving twelve channels to an allegedly unregulated package, thereby eliminating an entire cable programming service tier. While we have acknowledged that aspects of our evaluation of a la carte packages were unclear,[33] as applied to these particular facts, this prong of the test is clear and requires no additional guidance or explanation from the Commission. In light of the fact that it is clear that elimination of an entire regulated tier and transformation of that tier into an a la carte package is an evasion of rate regulation, we find that Cablevision's retiering in fact clearly constitutes just such an evasion.

22. We find that Cablevision's Family Cable package, as the offering existed in Boston, Massachusetts on November 17, 1993, the date of our LOI, must be treated as a rate-regulated cable programming service tier. As a result, effective 90 days from the release date of this Order, Cablevision must either offer the channels in this package as part of the respective rate-regulated tiers from which they came or offer the channels collectively as a separate rate-regulated tier of cable programming service.[34] We further conclude that this package is a rate-regulated offering as of September 1, 1993, and that the channels composing it must be counted as rate-regulated channels for purposes of rate justification as of that date.

V. ORDERING CLAUSES

23. Accordingly, IT IS ORDERED that Cablevision's Family Cable package is subject to rate regulation as of September 1, 1993, and the channels composing it must be counted by Cablevision as rate-regulated channels for purposes of rate justification, as of that date.

24. IT IS FURTHER ORDERED that, effective 90 days from the release date of this Order, Cablevision must either offer these channels as part of the respective rate-regulated tiers from which they came or offer the channels collectively as a separate rate-regulated tier of cable programming service.

25. IT IS FURTHER ORDERED that this Order is EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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27 *See, e.g.*, ¶ ¶ 12-14, *supra*.
28 *Second Reconsideration Order* ¶ 196.
29 *Id.*
30 *Id.*
31 *Rate Order* ¶ 328 n.808.
32 *Second Reconsideration Order* ¶ 196.
33 *Warner Cable Communications*, Milwaukee, Wisconsin, LOI-93-14, DA 94-1276 (released November 18, 1994).

34 To provide 90 days gives Cablevision ample time to comply with the 30 day notice provisions of our regulations for rate and programming changes. *See* 47 C.F.R. §§ 76.309(c)(3)(i)(B), 76.932 and 76.964. Cablevision, of course, may continue to offer any channels as single channel offerings consistent with the 1992 Cable Act and our rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Cablevision Industries LOI-94-7
Wake Forest, North Carolina

Letter of Inquiry

MEMORANDUM OPINION AND ORDER

Adopted: December 18, 1994; Released: December 22, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. In a letter received by the Commission, dated December 29, 1993, the Town of Wake Forest, North Carolina, alleged violations by Cablevision Industries ("CVI") of Commission regulations governing the provision of cable television service. In response to this complaint, the Commission issued Letter of Inquiry 94-7 ("LOI") to CVI on February 22, 1994.[1] The LOI asked Cablevision to provide information concerning, among other issues, rate and service changes in anticipation of, and/or in response to, rate regulation, including the offering of channels on an individual and package basis.[2] CVI responded to our LOI on March 24, 1994.

II. BACKGROUND

2. In the Cable Television Consumer Protection and Competition Act of 1992 ("the 1992 Cable Act"), Congress created a regulatory scheme giving the Commission and local franchising authorities jurisdiction over the cable programming and equipment rates of non-competitive cable systems. The 1992 Cable Act provides that the rates of cable systems not subject to effective competition may be regulated by local franchising authorities, in the case of basic service, and by the Commission, in the case of cable programming services.[3] A stated policy of the 1992 Cable Act is to ensure that "consumer interests are protected in the receipt of cable service."[4]

3. The 1992 Cable Act requires cable operators to offer subscribers a basic tier that must contain at least all qualified local broadcast signals and, unless otherwise specified by the local franchising authority, public, educational, and governmental channels.[5] The Commission was charged by the 1992 Cable Act with creating regulations that ensure that the rates for the basic service tier are reasonable.[6] The 1992 Cable Act directs that "[s]uch regulations shall be designed to achieve the goal of protecting subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition."[7] Under the 1992 Cable Act, operators may offer other channels in a cable programming service tier or tiers.[8] The 1992 Cable Act orders the Commission to create regulations for the cable programming service tiers that allow it to identify individual cases of unreasonable rates.[9] The 1992 Cable Act thus protects consumers' interests in continuing to receive the basic service tier and cable programming service tiers at reasonable rates.

4. The 1992 Cable Act requires the Commission to adopt standards and guidelines to prevent evasions, "including evasions that result from retiering."[10] The 1992 Cable Act's legislative history states that the Commission should scrutinize offerings of non-traditional stand-alone services to "prevent repricing, retiering, or other alterations of rate

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[1] Letter from Alexandra M. Wilson, Acting Chief, Cable Services Bureau, FCC, to Cablevision Industries, Wake Forest, North Carolina, LOI-94-7 (February 22, 1994). Copies of the Letter of Inquiry and Response are available to the public in the FCC's Cable Reference Center, 2033 M Street, N.W., Room 333, Washington, D.C. We note that there is a pending rate complaint proceeding involving CVI. Our decision made herein will be made a part of that proceeding. Thus, for example, we will not order CVI to make refunds to subscribers in regard to CVI's purported "a la carte" restructuring. Obviously, however, we may order refunds if we find violations of other rules that should result in refunds.

[2] The LOI also requested information concerning Cablevision's compliance with regulations governing the *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket 92-266, *Order*, 8 FCC Rcd 2921 (1993) (*"Rate Freeze Order"*), *clarified*, 8 FCC Rcd 2917, 58 FR 21929 (April 26, 1993); *extended*, FCC 93-304 (released June 15, 1993), 58 FR 33560 (June 18, 1993), *Erratum*, 8 FCC Rcd 4511 (1993); *extended*, FCC 93-494 (released November 10, 1993), 58 FR 60141 (November 15, 1993); *extended*, 9 FCC Rcd 1299, 59 FR 6901 (February 14, 1994). This Order addresses only the regulatory status of Cablevision's a la carte package. Other issues in the LOI will be dealt with subsequently.

[3] Communications Act of 1934, as amended, § 623(a)(2), 47 U.S.C. § 543(a)(2) (1992).

[4] Pub. L. No. 102-385 § 2 (b) (4), 106 Stat. 1460 (1992); *see also* H.R. Rep. No. 628, 102d Cong., 2d Sess. at 34 (1992).

[5] Communications Act of 1934 § 623(b)(7)(A)(ii-iii), 47 U.S.C. § 543(b)(7)(A)(ii-iii); *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket 92-266, *Report and Order and Further Notice of Proposed Rulemaking*, 8 FCC Rcd 5631 at ¶ ¶ 157-161 (1993) (*"Rate Order"*) (franchising authorities may require operators to carry PEG channels on tiers other than basic).

[6] Communications Act of 1934 § 623(b)(1), 47 U.S.C. § 543(b)(1).

[7] *Id.*

[8] Communications Act of 1934 § 623(l)(2), 47 U.S.C. § 543(l)(2).

[9] Communications Act of 1934 § 623(c)(1)(A), 47 U.S.C. § 543(c)(1)(A). Identification of individual cases of unreasonable rates is achieved by a process in which the Commission assumes jurisdiction over systems where a complaint about a cable programming service tier rate is filed.

[10] Communications Act of 1934 § 623(h), 47 U.S.C. § 543(h).

structures" that could have the effect of evading the purposes of rate regulation.[11] This provision in the 1992 Cable Act is intended to give the Commission the authority to address changes in the cable industry's business practices that would thwart the intent of rate regulation.[12]

5. In the *Rate Order*, the Commission defined evasion as "any practice or action which avoids the rate regulation provisions of the Cable Act or Commission rules contrary to the intent of the Act or its underlying policies."[13] We must scrutinize a particular operator's marketing or pricing practices to determine whether those practices have the effect of avoiding the requirements of our rate regulations, contrary to the intent of the 1992 Cable Act and our rules.

III. FACTS

6. Before September 1, 1993, CVI offered a 12 channel basic tier, called Basic Reception Service, for $11.95 per month, and a 21 channel cable programming service tier, called Cable Programming Tier 1, for $11.45 per month.

7. The following charts summarize CVI's service tier offerings prior to September 1, 1993:

Offeringm	Channels	Price
1. Basic Reception Service	12	$11.95
2. Cable Programming Tier 1	21	$11.45
Total	33	$23.40

8. Beginning September 1, 1993, the date our rate regulations became effective, CVI restructured its service offerings. CVI's restructured service offerings included a 14 channel basic tier, called Basic Reception Service, for $9.15 per month, an 18 channel cable programming service tier, called Cable Programming Tier 1, for $12.70 per month, and three channels it states were offered on an individual basis and as a package. The three channels, HTS, Cable News Network (CNN), and The Discovery Channel, were offered as part of Cable Programming Tier 1 prior to September 1, 1993.

9. CVI states that the three channels could be purchased individually for $1.50 per month. All three channels could be purchased as a package, called Cable Programming Package 1, for $3.00 per month.

10. The following charts summarize CVI's service tier options as of the date of its response to our LOI:[14]

Offering	Channels	Price
1. Basic Reception Service	14	$ 9.15
2. Cable Programming Tier 1	18	$12.70
3. Cable Programming Package 1	3	$ 3.00
Total	35	$24.85

11. CVI argues, *inter alia*, that it began offering its services individually and through the Cable Programming Package 1 in order to implement Congress' intent to maximize consumer choice. However, based on the record, very few consumers elected to exercise that choice. CVI states that, as of February 1994, 5 of its 1,803 subscribers purchased one or more individual channels, while 1,708 subscribed to the Cable Programming Package 1.

IV. DISCUSSION

12. The 1992 Cable Act requires the Commission to adopt standards and guidelines to prevent evasions, "including evasions that result from retiering."[15] An evasion, as defined by the Commission, is an act or practice that "avoids the rate regulation provisions of the [Cable] Act or our rules contrary to the intent of the Act or its underlying policies."[16] In the *Rate Order*, we stated that "retiering otherwise permitted under our rules will not be deemed an evasion."[17] First, we examine whether CVI's response to the LOI shows that its restructuring of its offerings had the effect of evading rate regulation for the channels that Congress intended to be rate-regulated.

13. CVI's restructuring effective September 1, 1993, involved its movement of three channels (HTS, CNN and Discovery) from its 21 channel Programming Services Tier 1 to create the three-channel package that it alleges is not rate-regulated. Thus, CVI removed channels from an otherwise rate-regulated tier to create a new package of channels. In so doing, CVI avoided application of our rate regulations which generally required cable operators to reduce rates by about 10 percent. That is, if CVI had not restructured on September 1, 1993, it would have been required to recalculate its rates in accordance with the *Rate Order* we released on May 3, 1993, which generally required cable operators to reduce their rates. Moreover, customers who were receiving the three Programming Services Tier 1 channels at issue apparently continued to receive them after the restructuring, and there appears to be no sufficient justification for CVI's restructuring other than to avoid rate regulation.

14. Other factors corroborate our view that CVI's restructuring may have had the effect of avoiding rate regulation. First, it offered this package on the eve of regulation. Second, it appears that CVI automatically subscribed its Cable Programming Tier 1 customers to the offerings that previously had been part of its cable programming service tier. In light of these facts, it appears that CVI's restructuring of its offerings may have evaded rate regulation. We will not find an actual evasion occurred, however, if CVI's action complied with our a la carte policy that was in effect at the time of its restructuring. If the offering met our requirements for a permissible collective offering of a la carte channels, then CVI would not have evaded our rate regulations because it would not be required to reduce its price for the collective a la carte package.[18]

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[11] H.R. Rep. No. 628 at 79.

[12] S. Rep. No. 92, 102d Cong., 2d Sess. at 77 (1992).

[13] *Rate Order* ¶ 451.

[14] This Order does not evaluate CVI's rates for its basic and cable programming service tiers. These rates are subject to review by the local franchising authority and the Commission in a separate proceeding.

[15] Communications Act of 1934 § 623(h), 47 U.S.C. § 543(h) (1992).

[16] *Rate Order* ¶ 451.

[17] *Id.* at ¶ 453.

[18] In our *Going Forward Order*, we have reconsidered our regulatory treatment of collective offerings of a la carte chan-

15. In our *Rate Order*, the Commission recognized that "a la carte packages" appear to be "cable programming services," but said that "interpreting the statute in such a literal fashion could disadvantage consumers by denying them discounts on packages of per-channel or per-program services and by limiting subscriber access to a greater quantity of premium programming."[19] Thus, we envisioned that cable operators, for the most part, would offer channels that previously had been offered a la carte in discounted packages, and concluded that it would be better for consumers if we construed the 1992 Cable Act to permit such discounting.[20] This is not the type of offering that CVI and others have provided their subscribers. Specifically, these operators did not offer a discounted package of channels that previously had been offered a la carte to subscribers, but instead removed channels from a tier that would be subject to our rate regulations.

16. Moreover, in the *Rate Order*, the Commission determined that such a la carte packages would be exempt from rate regulation, i.e., would be deemed not to fall within the definition of "cable programming service," if two conditions were met: (1) the price for the combined package must not exceed the sum of the individual charges for each component service; and (2) the cable operator must continue to provide the component parts of the package to subscribers separately in addition to the package. The Commission said that the second condition would be satisfied only when "the per channel offering provides consumers with a realistic service choice."[21]

17. Under the two-part test that we set forth in the *Rate Order*, it is clear, first, that the price for the combined package does not exceed the sum of the individual charges for the three services, because subscribers may purchase the three channels for $1.50 each or the three-channel package for $3.00. The second part of the test is whether the separate parts of the packageconstitute a "realistic service offering." Our review of CVI's submission reveals that far less than 1 percent of CVI's subscribers chose to subscribe to individual Cable Programming Package 1 channels. Our test does not specify what percentage would indicate that an offering is "a realistic service offering." However, the fact that such a low percentage of subscribers opted for individual channels rather than the package, together with the other factors present in this case,[22] tends to show, in this instance, that the per-channel offering does not constitute a realistic service offering.

18. Even if we were to apply the 15 interpretive guidelines set forth in our *Second Reconsideration Order*,[23] we still would not reach a clear answer to the question of what constitutes a realistic service offering. Although some factors support a finding that CVI's offering was not a permissible a la carte package, other factors point the other way. In particular, although a "significant percentage" of the channels offered in the a la carte package (100 percent) was removed from regulated tiers, the absolute number (three) was small.[24] Moreover, our test does not explain how the factors are to be weighed against each other. In these circumstances, we cannot say that it was clear to CVI that its restructuring was not a permissible a la carte package.

19. In our recently adopted *Going Forward Order*, we have reconsidered our rules relating to a la carte packages and concluded that such packages are cable programming service tiers within the meaning of Section 3(l)(2) of the 1992 Cable Act. For that reason, the package at issue is subject to rate regulation and cannot continue to be treated as an unregulated package of channels. In reaching this conclusion in the *Going Forward Order*, we acknowledged that, as applied to many fact patterns, we did not provide a clear test in the *Rate Order* and the *Second Reconsideration Order* for determining whether an a la carte package was permissible. In adopting the 15 interpretive guidelines in the *Second Reconsideration Order* to supplement the *Rate Order's* two-prong test, we hoped to enable operators to better determine what collective offerings of a la carte channels would be considered a realistic service offering, and, hence, not an evasion of rate regulation.[25] Our experience to date, however, indicates that our efforts did not produce the intended result and that, instead, there has been confusion as to whether collective offerings of a la carte channels constituted an evasion of rate regulation. Indeed, we cannot say that it is clear that CVI's restructuring was not a permissible a la carte package.

20. For that reason, we do not think that it would be equitable to subject CVI to refund liability. This result is distinguishable from the result we reached in *Adelphia Cable Partners, L.P.*,[26] in which we determined that we will

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nels. *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking*, MM Docket Nos. 92-266 and 93-215, FCC 94-286 (adopted November 10, 1994) *("Going Forward Order")*. Specifically, we have determined that such packages are cable programming service tiers within the meaning of Section 3(l)(2) of the 1992 Cable Act and therefore will be subject to our general rate regulation rules. *Id.* at ¶46. However, in order to determine whether CVI evaded rate regulation when it restructured its offering, we must evaluate its a la carte package under the rules that were in effect when it restructured.

[19] *Rate Order* ¶ 329.

[20] *See, e.g., Rate Order* ¶ 453 n.1161 ("There is no evidence that operators would or, as a business matter, could shift programming previously offered as part of a tier to 'a la carte' status, *i.e.*, a per-channel or per-program offering, to avoid the rate regulation applicable to tiers").

[21] *Id.* at ¶ ¶ 327-28 & n.808. In the *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket No. 92-266, *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, 9 FCC Rcd 4119 (1994) *("Second Reconsideration Order")*, the Commission affirmed its prior view. It said that "we continue to believe that the public interest will be served by generally permitting non-regulated treatment of collective offerings of 'a la carte' channels if the offering enhances consumer choice and does not constitute an evasion of rate regulation." *Id.* at ¶ 194. In this regard, we retained the two-part test contained in the *Rate Order* for determining when we would refrain from regulating "a la carte packages." In addition, the Commission set out 15 guidelines to enable operators to better determine what collective offerings of "a la carte" channels will be considered "realistic service offerings." *Id.* at ¶ 195.

[22] *See, e.g.*, ¶ ¶ 13-14, *supra*.

[23] *Second Reconsideration Order* at ¶ 196.

[24] *Id.*

[25] *See Going Forward Order* at ¶ 40.

[26] *Adelphia Cable Partners, L.P.*, South Dade County, Florida, LOI-93-42, DA 94-1277 (released November 18, 1994).

require refunds if Adelphia's rate justification proceedings show that subscribers' rates were higher than our rules permitted. In that case, the cable operator announced that it would offer all the channels previously offered on a cable programming service tier on an individual basis or as a collective offering of a la carte channels. In so doing, Adelphia removed an entire service tier from rate regulation, while here, CVI did not eliminate any cable programming service tiers. CVI attempted to treat only three channels as an unregulated collective offering of a la carte channels. Moreover, while we have indicated above that our rules for determining whether collective offerings of a la carte channels constitute an evasion were in many instances difficult to apply, we do not believe that our a la carte rules are unclear as applied to the fact pattern in the *Adelphia* case. In the *Rate Order*, we stated that a cable operator could not escape rate regulation simply by calling what otherwise would be a rate regulated tier an a la carte package.[27] We reiterated this admonition in the *Second Reconsideration Order* when we warned against eliminating "an entire regulated tier" and "turning it into an a la carte package."[28]

21. We will not require CVI to restructure its tiers so as to return the channels offered in the a la carte package to the basic or cable programming service tiers.[29] Instead, on a prospective basis, we will consider CVI's collective offering of a la carte channels a new product tier[30] even though it would not qualify as a new product tier under our recently announced *Going Forward Order* because one of the conditions for a new product tier is that channels may not be removed from a basic service tier or a cable programming service tier. In light of the prior confusion over what constituted a permissible a la carte offering, and because CVI's three-channel tier, unlike Adelphia's offering, did not constitute a clear evasion of our rate rules, we see no good reason to subject CVI or its Wake Forest customers to the confusion and transaction costs that would result if we required CVI to retier.

V. ORDERING CLAUSES

22. Accordingly, IT IS ORDERED that CVI's package as it existed on February 22, 1994, may be treated as a new product tier under our *Going Forward Order*.

23. IT IS FURTHER ORDERED that this Order is EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[27] *Rate Order*, 8 FCC Rcd 5837, n.808 ("we do not think a cable operator can escape rate regulation simply by announcing that tiered services are available a la carte").

[28] *Second Reconsideration Order* ¶ 196.

[29] We are not precluding CVI from treating this package as a cable programming service tier, priced pursuant to our rules, "or from putting the channels back into an existing tier.

[30] *See Going Forward Order* at ¶ ¶ 16-37.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Vision Cable of North Carolina, Inc.
Charlotte, NC
Mecklenburg County, NC

LOI 93-24

Letter of Inquiry

MEMORANDUM OPINION AND ORDER

Adopted: December 19, 1994; Released: December 22, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. In a memorandum received by the Commission, dated September 20, 1994, the City of Charlotte and Mecklenburg County, NC, alleged violations by Vision Cable of North Carolina, Inc. ("Vision Cable") of Commission regulations governing the provision of cable television service. In response to this complaint, the Commission issued Letter of Inquiry 93-24 ("LOI") to Vision Cable on December 13, 1993.[1] The LOI asked Vision Cable to provide information concerning, among other issues, its compliance with the Commission's rules governing evasion in the offering of packages which allegedly are not rate-regulated.[2] Vision Cable responded to our LOI on January 12, 1994.

II. BACKGROUND

2. In the Cable Television Consumer Protection and Competition Act of 1992 ("the 1992 Cable Act"), Congress created a regulatory scheme giving the Commission and local franchising authorities jurisdiction over the cable programming and equipment rates of non-competitive cable systems. The 1992 Cable Act provides that the rates of cable systems not subject to effective competition may be regulated by local franchising authorities, in the case of basic service, and by the Commission, in the case of cable programming services.[3] A stated policy of the 1992 Cable Act is to ensure that "consumer interests are protected in the receipt of cable service."[4]

3. The 1992 Cable Act requires cable operators to offer subscribers a basic tier that must contain at least all qualified local broadcast signals and, unless otherwise specified by the local franchising authority, public, educational, and governmental channels.[5] The Commission was charged by the 1992 Cable Act with creating regulations that ensure that the rates for the basic service tier are reasonable.[6] The 1992 Cable Act directs that "[s]uch regulations shall be designed to achieve the goal of protecting subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition."[7] Under the 1992 Cable Act, operators may offer other channels in a cable programming service tier or tiers.[8] The 1992 Cable Act orders the Commission to create regulations for the cable programming service tiers that allow it to identify individual cases of unreasonable rates.[9] The 1992 Cable Act thus protects consumers' interests in continuing to receive the basic service tier and cable programming service tiers at reasonable rates.

4. The 1992 Cable Act requires the Commission to adopt standards and guidelines to prevent evasions, "including evasions that result from retiering."[10] The 1992 Cable Act's legislative history states that the Commission should scrutinize offerings of non-traditional stand-alone services to "prevent repricing, retiering, or other alterations of rate structures" that could have the effect of evading the purposes of rate regulation.[11] This provision in the 1992 Cable

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[1] Letter from Roy J. Stewart, Chief, Mass Media Bureau, FCC, to Mr. Milton Moore, Manager, Vision Cable of North Carolina, Inc., LOI-93-24 (December 13, 1993). Copies of the Letter of Inquiry and Response are available to the public in the FCC's Cable Reference Center, 2033 M Street, N.W., Room 333, Washington, D.C. We also note that there is a pending rate complaint proceeding involving Vision Cable. Our decisions made herein will be made a part of that proceeding.

[2] The LOI also requested information concerning negative option billing and compliance with regulations governing the *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket 92-266, *Order*, 8 FCC Rcd 2921 (1993) (*"Rate Freeze Order"*), *clarified*, 8 FCC Rcd 2917, 58 FR 21929 (April 26, 1993); *extended*, FCC 93-304 (released June 15, 1993), 58 FR 33560 (June 18, 1993), *Erratum*, 8 FCC Rcd 4511 (1993); *extended*, FCC 93-494 (released November 10, 1993), 58 FR 60141 (November 15, 1993); *extended*, 9 FCC Rcd 1299, 59 FR 6901 (February 14, 1994). This Order addresses only the regulatory status of the package. Other issues in the LOI will be dealt with subsequently.

[3] Communications Act of 1934, as amended, § 623 (a)(2), 47 U.S.C. § 543 (a)(2) (1992).

[4] Pub. L. No. 102-385 § 2 (b) (4), 106 Stat. 1460 (1992); *see also* H.R. Rep. No. 628, 102d Cong., 2d Sess. at 34 (1992).

[5] Communications Act of 1934 § 623 (b)(7)(A)(ii-iii), 47 U.S.C. § 543 (b)(7)(A)(ii-iii) (1992); *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket 92-266, *Report and Order and Further Notice of Proposed Rulemaking*, 8 FCC Rcd 5631 at ¶ ¶ 157-161 (1993) (*"Rate Order"*) (franchising authorities may require operators to carry PEG channels on tiers other than basic).

[6] Communications Act of 1934 § 623 (b)(1), 47 U.S.C. § 543 (b)(1) (1992).

[7] *Id.*

[8] Communications Act of 1934 § 623(l)(2), 47 U.S.C. § 543(l)(2) (1992).

[9] Communications Act of 1934 § 623 (c)(1)(A), 47 U.S.C. § 543 (c)(1)(A) (1992). Identification of individual cases of unreasonable rates is achieved by a process in which the Commission assumes jurisdiction over systems where a complaint about a cable programming service tier rate is filed.

[10] Communications Act of 1934 § 623(h), 47 U.S.C. § 543(h) (1992).

[11] H.R. Rep. No. 628 at 79.

Act is intended to give the Commission the authority to address changes in the cable industry's business practices that would thwart the intent of rate regulation.[12]

5. In the *Rate Order* the Commission defined evasion as "any practice or action which avoids the rate regulation provisions ofthe Cable Act or Commission rules contrary to the intent of the Act or its underlying policies."[13] We must scrutinize a particular operator's marketing or pricing practices to determine whether those practices have the effect of avoiding the requirements of our rate regulations, contrary to the intent of the 1992 Cable Act and our rules.

III. FACTS

6. Before September 1, 1993, Vision Cable's services included a 16 channel basic tier, called Broadcast Basic, for $1.00 per month, a 27 channel cable programming service tier, called Cable Service, for $19.00 per month, and an additional 4 channel cable programming service tier, called Preferred Service, for $4.00 per month. Vision Cable's subscribers could receive a total of 47 channels for $24.00 per month.

7. The following chart summarizes Vision Cable's service tier offerings prior to September 1, 1993:

Offering	Channels	Price
1. Broadcast Basic	16	$ 1.00
2. Cable Service	27	$19.00
3. Preferred Service	4	$ 4.00
TOTAL	47	$24.00

8. On September 1, 1993, the date our rate regulations became effective, Vision Cable restructured its service offerings. Vision Cable's restructured service offerings included a 13 channel Basic tier for $6.65 per month, and a 26 channel cable programming service tier called Cable Service for $13.31 per month. Vision Cable also created two programming packages, SuperStation Package and Preferred Package, with the channels also offered on an individual basis.

9. The first package, SuperStation Package, included four channels (three channels, WTBS, WOR and WGN, originally were offered in Vision Cable's Broadcast Basic tier, and one channel, TNT, originally was offered in Vision Cable's Cable Service tier). The channels could be purchased individually for $.50 per month, or as a package for $1.27 per month. The second package, Preferred Package, included the same four channels originally offered on the Preferred Service tier, Sport South, Sci-Fi Channel, Comedy Central, and Country Music TV. The channels could be purchased individually for $1.25 per month, or as a package for $3.50 per month. In addition, Vision Cable stated that all of its customers continued to receive the same programming services that they received prior to the restructuring. Vision Cable's restructuring allowed customers to receive 47 channels at a total price of $24.73 per month.

10. The following chart summarizes Vision Cable's service tier options as of the date of its response to our LOI:[14]

Offering	Channels	Price
1. Basic	13	$ 6.65
2. Cable Service	26	$13.31
3. SuperStation Package	47	$ 1.27 or $ .50 per channel
4. Preferred Package	4	$ 3.50 or $ 1.25 per channel
TOTAL	47	$24.73 (if purchased both packages)

11. Vision Cable argues, *inter alia*, that it began offering its Preferred Package channels individually, as well as WTBS, WGN, WOR, and TNT individually and through its SuperStation Package, in order to implement Congress' intent to maximize consumer choice. However, based on this record, very few consumers elected to exercise that choice. Vision Cable's response provides a breakdown of its subscribers who chose the packages and the individual channels. As of January 10, 1994, 46,060 subscribers elected to take the SuperStation Package, while the numbers of subscribers taking the individual channels comprising that package were as follows: WTBS-111; WGN-13; WOR-14; TNT-108. With respect to the Preferred Package, as of January 10, 1994, 27,171 subscribers elected to take the entire package, while 1,624 took SportSouth, 279 took the Sci-Fi Channel, 193 took the Comedy Channel, and 265 took Country Music TV.

IV. DISCUSSION

12. The 1992 Cable Act requires the Commission to adopt standards and guidelines to prevent evasions, "including evasions that result from retiering."[15] An evasion, as defined by the Commission, is an act or practice that "avoids the rate regulation provisions of the [Cable] Act or our rules contrary to the intent of the Act or its underlying policies."[16] In the *Rate Order*, we stated that "retiering otherwise permitted under our rules will not be deemed an evasion."[17] First, we examine whether Vision Cable's response to the LOI shows that its restructuring of its offerings had the effect of evading rate regulation for the channels that Congress intended to be rate-regulated.

13. Vision Cable's restructuring involved its offering of four channels previously offered on its Preferred Service tier on an individual and package basis, and its movement of four channels, three from its Broadcast Basic tier and one from its Cable Service tier, to create the packages that it alleges are not rate-regulated. Thus, with respect to the SuperStation Package, Vision Cable removed channels from otherwise rate-regulated tiers to create a new package of channels. As to the Preferred Package, Vision Cable's offering of the component channels on an individual basis purportedly removed the Preferred Service tier from rate regulation. Vision Cable fundamentally changed its service

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[12] S. Rep. No. 92, 102d Cong., 2d Sess. at 77 (1992).
[13] *Rate Order* ¶ 451.
[14] This order does not evaluate Vision Cable's rates for its basic and cable programming service tiers. These rates are subject to review by the local franchising authority and the Commission in separate proceedings.
[15] Communications Act of 1934 §623(h), 47 U.S.C. § 543(h) (1992).
[16] *Rate Order* ¶ 451.
[17] *Id.* at ¶ 453.

to subscribers by removing a total of 8 channels from rate regulation and by eliminating an entire cable programming service tier. In so doing, Vision Cable avoided application of our rate regulations to 8 channels which generally required cable operators to reduce rates by about ten percent. That is, if Vision Cable had not restructured on September 1, 1993, it would have been required to recalculate its rates in accordance with the *Rate Order* we released on May 3, 1993, which generally required cable operators to reduce their rates. Moreover, customers that were receiving the Broadcast Basic tier continued to receive WTBS, WOR, TNT, and WGN as part of the Superstation Package, and customers that were receiving the Preferred Service tier continued to receive the same four channels as part of the Preferred Package after the restructuring.

14. We believe that Vision Cable has not provided a sufficient justification for this change to overcome our finding that there is an evasion of rate regulation. To the contrary, virtually all of Vision Cable's subscribers to its former cable programming service tier were given the package of identical channels. (Few subscribers actually subscribed to individual channels instead of either of the packages offered; at most, only 1 percent of Vision Cable subscribers who took any part of the SuperStation Package took the individual channels, and only 8 percent of subscribers who took any part of the Preferred Package took individual channels). Other than an attempt to evade rate regulation, there appears to be no sufficient justification for this restructuring.

15. Other factors corroborate our finding that Vision Cable's restructuring had the effect of evading rate regulation. First, it made all of the Preferred Service channels available individually and on a package basis, thereby completely eliminating an entire cable programming service tier, and it also' offered the SuperStation Package, all on the eve of regulation. Second, it automatically subscribed its Preferred Service customers to the Preferred Package and its Cable Service subscribers to the SuperStation Package. In light of these facts, we find that Vision Cable's restructuring of its offerings constituted an evasion of our rate regulations.

16. Because Vision Cable's restructuring is a purported collective offering of a la carte channels, we also must determine whether the offering met the Commission's requirements for a permissible collective offering of a la carte channels. If the offering met the Commission's requirements for a permissible collective offering of a la carte channels, then Vision Cable would not have evaded our rate regulations because it would not be required to reduce its price for the collective a la carte package.[18]

17. In our *Rate Order*, the Commission recognized that "a la carte packages" appear to be "cable programming services," but said that "interpreting the statute in such a literal fashion could disadvantage consumers by denying them discounts on packages of per-channel or per-program services and by limiting subscriber access to a greater quantity of premium programming."[19] Thus, we envisioned that cable operators, for the most part, would offer channels that previously had been offered a la carte in discounted packages, and concluded that it would be better for consumers if we construed the 1992 Cable Act to permit such discounting.[20] This is not the type of offering that Vision Cable and others have provided their subscribers. Specifically, these operators did not offer a discounted package of channels that previously had been offered a la carte to subscribers, but instead removed channels from a tier that would be subject to our rate regulations.

18. Moreover, in the *Rate Order*, the Commission determined that a la carte packages would be exempt from rate regulation, i.e., would be deemed not to fall within the definition of "cable programming service," if two conditions were met: (1) the price for the combined package must not exceed the sum of the individual charges for each component service; and (2) the cable operator must continue to provide the component parts of the package to subscribers separately in addition to the package. The Commission said that the second condition would be satisfied only when "the per channel offering provides consumers with a realistic service choice."[21]

19. Under the two-part test that we set forth in the *Rate Order*, it is clear, first, that the prices for the two combined packages do not exceed the sum of the individual channel charges, because with respect to the SuperStation Package, subscribers may purchase each channel for $.50, or the four-channel package for $1.27; with respect to the Preferred Package, subscribers may purchase each channel for $1.25, or the package for $3.50. The second part of the test is whether the separate parts of the package constitute a "realistic service offering." The results of our review of Vision Cable's submission reveal that 99 percent of Vision

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[18] In our *Going Forward Order*, we have reconsidered our regulatory treatment of collective offerings of a la carte channels. *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking*, MM Docket Nos. 92-266 and 93-215, FCC 94-286 (adopted November 10, 1994) (*"Going Forward Order"*). Specifically, we have determined that such packages are cable programming service tiers within the meaning of Section 3(l)(2) of the 1992 Cable Act and therefore will be subject to our general rate regulation rules. *Id.* at ¶ 46. However, in order to determine whether Vision Cable evaded rate regulation when it restructured its offering, we must evaluate its a la carte package under the rules that were in effect when it restructured.

[19] *Rate Order* ¶ 329.

[20] *See, e.g., Rate Order* at ¶ 453 n.1161 ("There is no evidence that operators would or, as a business matter, could shift programming previously offered as part of a tier to 'a la carte' status, *i.e.*, a per-channel or per-program offering, to avoid the rate regulation applicable to tiers").

[21] *Id.* at ¶ ¶ 327-28 & n.808. In the *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket No. 92-266, *Second Order on Reconsideration, Fourth Report & Order, and Fifth Notice of Proposed Rulemaking*, 9 FCC Rcd 4119 (1994) (*"Second Reconsideration Order"*), the Commission affirmed its prior view. It said that "we continue to believe that the public interest will be served by generally permitting non-regulated treatment of collective offerings of 'a la carte' channels if the offering enhances consumer choice and does not constitute an evasion of rate regulation." *Id.* at ¶ 1

94. In this regard, we retained the two-part test contained in the *Rate Order* for determining when we would refrain from regulating "a la carte packages." In addition, the Commission set out 15 interpretive guidelines to enable operators to better determine what collective offerings of "a la carte" channels will be considered "realistic service offerings." *Id.* at ¶ 195.

Cable's subscribers who take any part of the SuperStation Package, and 92 percent who take any part of the Preferred Package, take the whole package rather than any of the individual channels.[22] This fact, together with the other factors present in this case,[23] tends to show that the per-channel offering, in this instance, does not constitute a realistic service offering.

20. Even if we were to apply the 15 interpretative guidelines set forth in our *Second Reconsideration Order*,[24] we still conclude that Vision Cable's offering does not constitute a realistic service offering. Vision Cable's submission reveals additional evidence weighing against a finding that its individual a la carte channels constitute a realistic service offering. The most important factor, of course, is that "an entire regulated tier has been eliminated and turned into an 'a la carte' package."[25] Moreover, a "significant percentage" of the channels offered in the two a la carte packages (100 percent) was removed from regulated tiers,[26] which would "weigh against unregulated treatment."[27]

21. In our recently adopted *Going Forward Order*, we have reconsidered our rules relating to a la carte packages and concluded that such packages are cable programming service tiers within the meaning of Section 3(l)(2) of the 1992 Cable Act. For that reason, the package at issue is subject to rate regulation and cannot continue to be treated as an unregulated package of channels. In reaching this conclusion in the *Going Forward Order*, we acknowledged that, as applied to many fact patterns, we did not provide a clear test in the *Rate Order* and the *Second Reconsideration Order* for determining whether an a la carte package was permissible.[28]

22. We do not believe, however, that our a la carte rules are unclear as applied to the fact pattern at issue in this case. In the *Rate Order* we stated that a cable operator could not escape rate regulation simply by calling what otherwise would be a rate-regulated tier an a la carte package.[29] We reiterated this admonition in the *Second Reconsideration Order* when we warned against eliminating "an entire regulated tier" and "turning [it] into an a la carte package."[30] This, however, is exactly what Vision Cable did by moving 8 channels to allegedly unregulated packages, and in the process, eliminating an entire cable programming service tier. While we have acknowledged that aspects of our evaluation of a la carte packages were unclear,[31] as applied to these particular facts, this prong of the test is clear and requires no additional guidance or explanation from the Commission. In light of the fact that it is clear that elimination of an entire regulated tier and transformation of that tier into an a la carte package is an evasion of rate regulation, we find that Vision Cable's retiering in fact clearly constitutes just such an evasion.

23. We find that Vision Cable's SuperStation and Preferred packages, as the offerings existed in Charlotte and Mecklenburg County, NC on December 13, 1993, the date of our LOI, must be treated as a rate-regulated cable programming service tiers. As a result, effective 90 days from the release date of this Order, Vision Cable must either offer the channels in these package as part of the respective rate-regulated tiers from which they came or offer the channels collectively as a separate rate-regulated tier or tiers of cable programming service.[32] We further conclude that these packages are rate-regulated offerings as of September 1, 1993, and that the channels composing them must be counted as rate-regulated channels for purposes of rate justification as of that date.

V. ORDERING CLAUSES

24. Accordingly, IT IS ORDERED that Vision Cable's packages are subject to rate regulation as of September 1, 1993, and the channels composing them must be counted by Vision Cable as rate-regulated channels for purposes of rate justification, as of that date.

25. IT IS FURTHER ORDERED that, effective 90 days from the release date of this Order, Vision Cable must either offer these channels as part of the respective rate-regulated tiers from which they came or offer the channels collectively as a separate rate-regulated tier or tiers of cable programming service.

26. IT IS FURTHER ORDERED that this Order is EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[22] This analyzes the facts most favorably to Vision Cable because we assume that each subscription to an individual channel represents one consumer.

[23] *See* ¶ ¶ 13-15, *supra*.

[24] *Second Reconsideration Order* ¶ 196.

[25] *Id*.

[26] By offering all of the channels in the Preferred Package individually, Vision Cable purportedly removed all of these channels from a regulated tier. In addition, it removed 100 percent of the channels in the SuperStation Package from regulated tiers.

[27] *Second Reconsideration Order* ¶ 196.

[28] In adopting the 15 interpretive guidelines in the *Second Reconsideration Order* to supplement the *Rate Order*'s two-prong test, we hoped to enable operators to better determine what collective offerings of a la carte channels would be considered a n evasion of rate regulation. *See Going Forward Order* ¶ 40.

[29] *Rate Order* ¶ 328 n.808.

[30] *Second Reconsideration Order* ¶ 196.

[31] *See Warner Cable Communications*, Milwaukee, Wisconsin, LOI-93-14, DA 94-1276 (released November 18, 1994).

[32] To provide 90 days gives Vision Cable ample time to comply with the 30 day notice provisions of our regulations for rate and programming changes. *See* 47 C.F.R. §§ 76.309(c)(3)(i)(B), 76.932 and 76.964. Vision Cable, of course, may continue to offer any channels as single channel offerings consistent with the 1992 Cable Act and our rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Vision Cable Television Co., Inc., Fort Lee, New Jersey — LOI 93-32

Letter of Inquiry

MEMORANDUM OPINION AND ORDER

Adopted: December 19, 1994; Released: December 22, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. The Commission received a Form 329 Complaint on October 26, 1993, concerning the reasonableness of the rates charged for cable programming services by Vision Cable Television Co., Inc., in Fort Lee, New Jersey ("Vision Cable"). In response to this complaint, the Commission issued Letter of Inquiry 93-32 ("LOI") to Vision Cable on December 13, 1993.[1] The LOI asked Vision Cable to provide information concerning its compliance with the Commission's rules governing evasion in the offering of packages which allegedly are not rate-regulated. Vision Cable responded to our LOI on January 12, 1994.

II. BACKGROUND

2. In the Cable Television Consumer Protection and Competition Act of 1992 ("the 1992 Cable Act"), Congress created a regulatory scheme giving the Commission and local franchising authorities jurisdiction over the cable programming and equipment rates of non-competitive cable systems. The 1992 Cable Act provides that the rates of cable systems not subject to effective competition may be regulated by local franchising authorities, in the case of basic service, and by the Commission, in the case of cable programming services.[2] A stated policy of the 1992 Cable Act is to ensure that "consumer interests are protected in the receipt of cable service."[3]

3. The 1992 Cable Act requires cable operators to offer subscribers a basic tier that must contain at least all qualified local broadcast signals and, unless otherwise specified by the local franchising authority, public, educational, and governmental channels.[4] The Commission was charged by the 1992 Cable Act with creating regulations that ensure that the rates for the basic service tier are reasonable.[5] The 1992 Cable Act directs that "[s]uch regulations shall be designed to achieve the goal of protecting subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition."[6] Under the 1992 Cable Act, operators may offer other channels in a cable programming service tier or tiers.[7] The 1992 Cable Act orders the Commission to create regulations for the cable programming service tiers that allow it to identify individual cases of unreasonable rates.[8] The 1992 Cable Act thus protects consumers' interests in continuing to receive the basic service tier and cable programming service tiers at reasonable rates.

4. The 1992 Cable Act requires the Commission to adopt standards and guidelines to prevent evasions, "including evasions that result from retiering."[9] The 1992 Cable Act's legislative history states that the Commission should scrutinize offerings of non-traditional stand-alone services to "prevent repricing, retiering, or other alterations of rate structures" that could have the effect of evading the purposes of rate regulation.[10] This provision in the 1992 Cable Act is intended to give the Commission the authority to address changes in the cable industry's business practices that would thwart the intent of rate regulation.[11]

5. In the *Rate Order* the Commission defined evasion as "any practice or action which avoids the rate regulation provisions of the Cable Act or Commission rules contrary to the intent of the Act or its underlying policies."[12] We must scrutinize a particular operator's marketing or pricing practices to determine whether those practices have the effect of avoiding the requirements of our rate regulations, contrary to the intent of the 1992 Cable Act and our rules.

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[1] Letter from Roy J. Stewart, Chief, Mass Media Bureau, FCC, to Vision Cable, Palisades Park, New Jersey, LOI-93-32 (December 13, 1993). Copies of the Letter of Inquiry and Response are available to the public in the FCC's Cable Reference Center, 2033 M Street, N.W., Room 333, Washington, D.C. We also note that there is a pending rate complaint proceeding involving Vision Cable. Our decisions made herein will be made a part of that proceeding.

[2] Communications Act of 1934, as amended, § 623 (a)(2), 47 U.S.C. § 543 (a)(2) (1992).

[3] Pub. L. No. 102-385 § 2 (b) (4), 106 Stat. 1460 (1992); *see also* H.R. Rep. No. 628, 102d Cong., 2d Sess. at 34 (1992).

[4] Communications Act of 1934 § 623 (b)(7)(A)(ii-iii), 47 U.S.C. § 543 (b)(7)(A)(ii-iii) (1992); *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket 92-266, *Report and Order and Further Notice of Proposed Rulemaking*, 8 FCC Rcd 5631 at ¶ ¶ 157-161 (1993) (*"Rate Order"*) (franchising authorities may require operators to carry PEG channels on tiers other than basic).

[5] Communications Act of 1934 § 623 (b)(1), 47 U.S.C. § 543 (b)(1) (1992).

[6] *Id.*

[7] Communications Act of 1934 § 623(l)(2), 47 U.S.C. § 543(l)(2) (1992).

[8] Communications Act of 1934 § 623 (c)(1)(A), 47 U.S.C. § 543 (c)(1)(A) (1992). Identification of individual cases of unreasonable rates is achieved by a process in which the Commission assumes jurisdiction over systems where a complaint about a cable programming service tier rate is filed.

[9] Communications Act of 1934 § 623(h), 47 U.S.C. § 543(h) (1992).

[10] H.R. Rep. No. 628 at 79.

[11] S. Rep. No. 92, 102d Cong., 2d Sess. at 77 (1992).

[12] *Rate Order* ¶ 451.

III. FACTS

6. Before September 1, 1993, Vision Cable's services included a 15 channel basic tier, called Broadcast Basic, for $1.00 per month, a 22 channel cable programming service tier, called Cable Service, for $20.20 per month, and an additional 4 channel cable programming service tier, called Preferred Service for $4.40 per month.

7. The following chart summarizes Vision Cable's service tier offerings prior to September 1, 1993:

Offering	Channels	Price
1. Broadcast Basic	15	$ 1.00
2. Cable Service	22	$20.20
3. Preferred Service	4	$ 4.40
TOTAL	41	$25.60

8. On September 1, 1993, the date our rate regulations became effective, Vision Cable restructured its service offerings. Vision Cable's restructured service offerings included a 15 channel Basic Service tier for $ 9.18 per month, and a 19 channel cable programming service tier called Cable Service for $11.63 per month. Vision Cable also created two programming packages, SuperStation Package and a package called Preferred Service, with the channels also offered on an individual basis.

9. The first package, SuperStation Package, included four channels (two channels, WTBS and WSBK,[13] originally offered in Vision Cable's Broadcast Basic tier, and two channels, TNT and The Discovery Channel, originally offered in Vision Cable's Cable Service tier). The channels could be purchased individually for $.75 per month, or as a package for $2.00 per month. The second package, Preferred Service, included the same four channels originally offered on the Preferred Service tier (SportsChannel, Sci-Fi Channel, Court TV, and the Nashville Network (TNN)), plus Black Entertainment Television (BET), which was not previously available on the system.[14] SportsChannel could be purchased individually for $2.00 per month and the other four channels could be purchased individually for $1.25 per month. All five of the Preferred Service channels could be purchased as a package for $4.00 per month. In addition, Vision Cable stated that it automatically subscribed its Broadcast Basic customers to WTBS and WSBK at the a la carte rate of $.75 per month each.

10. The following chart summarizes Vision Cable's service tier options as of the date of its response to our LOI:[15]

Offering	Channels	Price
1. Basic	15	$ 9.18
2. Cable Service	19	$11.63
3. SuperStation Package	4	$ 2.00
4. Preferred Service	5	$ 4.00
TOTAL	43	$26.81 (if purchased both packages)

11. Vision Cable argues, *inter alia*, that it began offering its Preferred Service channels individually, as well as WTBS, ESPN2, TNT, and the Discovery Channel, individually and through its SuperStation Package, in order to implement Congress' intent to maximize consumer choice. However, based on this record, very few consumers elected to exercise that choice. Vision Cable's response provides a breakdown of its subscribers who chose the packages and the individual channels. As of January 10, 1994, 46,196 subscribers elected to take the SuperStation Package, while the numbers of subscribers taking the individual channels comprising that package are as follows: WTBS-279; ESPN2-216; TNT-150; Discovery-106. With respect to the Preferred Service package, as of January 10, 1994, 12,921 subscribers elected to take the entire package, while 479 took SportsChannel; 296 took the Sci-Fi Channel; 133 took Court TV; 123 took TNN; and 0 took BET.[16]

IV. DISCUSSION

12. The 1992 Cable Act requires the Commission to adopt standards and guidelines to prevent evasions, "including evasions that result from retiering."[17] An evasion, as defined by the Commission, is an act or practice that "avoids the rate regulation provisions of the [Cable] Act or our rules contrary to the intent of the Act or its underlying policies."[18] In the *Rate Order*, we stated that "retiering otherwise permitted under our rules will not be deemed an evasion."[19] First, we examine whether Vision Cable's response to the LOI shows that its restructuring of its offerings had the effect of evading rate regulation for the channels that Congress intended to be rate-regulated.

13. Vision Cable's restructuring involved (1) its offering of two channels previously offered on its Broadcast Basic tier plus two channels previously offered on its Cable Service tier on an individual and package basis, and (2) its movement of four channels, previously offered on its Preferred Service tier and the addition of one new channel, to create the packages that it alleges are not rate-regulated. Thus, with respect to the SuperStation Package, Vision Cable removed channels from otherwise rate-regulated tiers to create a new package of channels. As to the Preferred Service package, Vision Cable's offering of the component channels on an individual basis (and adding a new channel) purportedly removed the Preferred Service tier from rate regulation. Vision Cable fundamentally changed its service to subscribers by removing 8 channels from rate regulation and by eliminating an entire cable programming service tier. In so doing, Vision Cable avoided the application to eight channels of our rate regulations which generally required cable operators to reduce rates by about 10 percent. That is, if Vision Cable had not restructured on September 1, 1993, it would have been required to recalculate its rates in accordance with the *Rate Order* we released on May 3, 1993, which generally required cable operators

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[13] WSBK was replaced by ESPN2 in the Superstation Package on January 1, 1994. ESPN2 was not previously offered by the Vision Cable.

[14] Black Entertainment Television (BET) was added to the system's Preferred Service tier on January 10, 1994.

[15] This order does not evaluate Vision Cable's rates for its basic and cable programming service tiers. These rates are subject to review by the local franchising authority and the Commission in separate proceedings.

[16] As discussed above, BET was added to the system only two days before Vision Cable prepared its response.

[17] Communications Act of 1934 § 623(h), 47 U.S.C. § 543(h) (1992).

[18] *Rate Order* ¶ 451.

[19] *Id.* at ¶ 453.

to reduce their rates. Moreover, customers that were receiving the Broadcast Basic tier continued to receive WTBS and WSBK after the restructuring, and it appears that customers who were receiving the Preferred Service tier continued to receive the same four channels as part of the Preferred Service package after the restructuring.

14. We believe that Vision Cable has not provided a sufficient justification for this change to overcome our finding that there is an evasion of rate regulation. Few subscribers actually subscribed to individual channels instead of either of the packages offered; at most, only 1.6 percent of Vision Cable subscribers who took any part of the SuperStation Package took the individual channels, while only approximately 8 percent of subscribers who took any part of the Preferred Service took individual channels at the time of Vision Cable's LOI response. Other than an attempt to evade rate regulation, there appears to be no sufficient justification for this restructuring.

15. Other factors corroborate our finding that Vision Cable's restructuring had the effect of evading rate regulation. First, it made all of the Preferred Service channels available individually and on a package basis, thereby entirely eliminating an entire cable programming service tier and it also offered the SuperStation Package, all on the eve of regulation. Second, it appears that Vision Cable automatically subscribed its Preferred Service customers to the Preferred Package and its Broadcast Basic customers to two of the channels in the SuperStation Package on an a la carte basis. In light of these facts, we find that Vision Cable's restructuring of its offerings constituted an evasion of our rate regulation rules.

16. Because Vision Cable's restructuring is a purported collective offering of a la carte channels, we also must determine whether the offering met the Commission's requirements for a permissible collective offering of a la carte channels. If the offering met the Commission's requirements for a permissible collective offering of a la carte channels, then Vision Cable would not have evaded our rate regulations because it would not be required to reduce its price for the collective a la carte package.[20]

17. In our *Rate Order*, the Commission recognized that "a la carte packages" appear to be "cable programming services," but said that "interpreting the statute in such a literal fashion could disadvantage consumers by denying them discounts on packages of per-channel or per-program services and by limiting subscriber access to a greater quantity of premium programming."[21] Thus, we envisioned that cable operators, for the most part, would offer channels that previously had been offered a la carte in discounted packages, and concluded that it would be better for consumers if we construed the 1992 Cable Act to permit such discounting.[22] This is not the type of offering that Vision Cable and others have provided their subscribers. Specifically, these operators did not offer a discounted package of channels that previously had been offered a la carte to subscribers, but instead removed channels from a tier that would be subject to our rate regulations.

18. Moreover, in the *Rate Order*, the Commission determined that a la carte packages would be exempt from rate regulation, i.e., would be deemed not to fall within the definition of "cable programming service," if two conditions were met: (1) the price for the combined package must not exceed the sum of the individual charges for each component service; and (2) the cable operator must continue to provide the component parts of the package to subscribers separately in addition to the package. The Commission said that the second condition would be satisfied only when "the per channel offering provides consumers with a realistic service choice."[23]

19. Under the two-part test that we set forth in the *Rate Order*, it is clear, first, that the prices for the two combined packages do not exceed the sum of the individual channel charges, becausePwith respect to the SuperStation Package, subscribers may purchase each channel for $ .75, or the four-channel package for $2.00, and with respect to the Preferred Service package, subscribers may purchase SportsChannel for $2.00 and each of the other four channels for $1.25, or the package for $4.00. The second part of the test is whether the separate parts of the package constitute a "realistic service offering." The results of our review of Vision Cable's submission reveal that more than 98 percent of Vision Cable's subscribers who take any part of the SuperStation Package, and 92 percent who take any part of the Preferred Service package, take the whole package rather than any of the individual channels.[24] This fact, together with the other factors present in this case,[25] tends to show that the per-channel offering, in this instance, does not constitute a realistic service offering.

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[20] In our *Going Forward Order*, we have reconsidered our regulatory treatment of collective offerings of a la carte channels. *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking*, MM Docket Nos. 92-266 and 93-215, FCC 94-286 (adopted November 10, 1994) *("Going Forward Order")*. Specifically, we have determined that such packages are cable programming service tiers within the meaning of Section 3(l)(2) of the 1992 Cable Act and therefore will be subject to our general rate regulation rules. *Id.* at ¶ 46. However, in order to determine whether Vision Cable evaded rate regulation when it restructured its offering, we must evaluate its a la carte package under the rules that were in effect when it restructured.

[21] *Rate Order* ¶ 329.

[22] *See, e.g., Rate Order* at ¶ 453 n.1161 ("There is no evidence that operators would or, as a business matter, could shift programming previously offered as part of a tier to 'a la carte' status, *i.e.*, a per-channel or per-program offering, to avoid the rate regulation applicable to tiers").

[23] *Id.* at ¶ ¶ 327-28 & n.808. In the *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket No. 92-266, *Second Order on Reconsideration, Fourth Report & Order, and Fifth Notice of Proposed Rulemaking*, 9 FCC Rcd 4119 (1994) *("Second Reconsideration Order")*, the Commission affirmed its prior view. It said that "we continue to believe that the public interest will be served by generally permitting non-regulated treatment of collective offerings of 'a la carte' channels if the offering enhances consumer choice and does not constitute an evasion of rate regulation." *Id.* at ¶ 194. In this regard, we retained the two-part test contained in the *Rate Order* for determining when we would refrain from regulating "a la carte packages." In addition, the Commission set out 15 interpretive guidelines to enable operators to better determine what collective offerings of "a la carte" channels will be considered "realistic service offerings." *Id.* at ¶ 195.

[24] This analyzes the facts most favorably to Vision Cable because we assume that each subscription to an individual channel represents one consumer.

[25] *See* ¶ ¶ 13-14, *supra*.

20. Even if we were to apply the 15 interpretive guidelines set forth in our *Second Reconsideration Order*,[26] we still conclude that Vision Cable's offering does not constitute a realistic service offering. Vision Cable's submission reveals additional evidence weighing against a finding that its individual a la carte channels constitute a realistic service offering. The most important factor, of course, is that "an entire regulated tier has been eliminated and turned into an 'a la carte' package."[27] Moreover, a "significant percentage" of the channels offered in the two a la carte packages (89 percent) was removed from regulated tiers,[28] which would "weigh against unregulated treatment."[29]

21. In our recently adopted *Going Forward Order*, we have reconsidered our rules relating to a la carte packages and concluded that such packages are cable programming service tiers within the meaning of Section 3(l)(2) of the 1992 Cable Act. For that reason, the package at issue is subject to rate regulation and cannot continue to be treated as an unregulated package of channels. In reaching this conclusion in the *Going Forward Order*, we acknowledged that, as applied to many fact patterns, we did not provide a clear test in the *Rate Order* and the *Second Reconsideration Order* for determining whether an a la carte package was permissible.[30]

22. We do not believe, however, that our a la carte rules are unclear as applied to the fact pattern at issue in this case. In the *Rate Order* we stated that a cable operator could not escape rate regulation simply by calling what otherwise would be a rate-regulated tier an a la carte package.[31] We reiterated this admonition in the *Second Reconsideration Order* when we warned against eliminating "an entire regulated tier" and "turning [it] into an a la carte package."[32] This, however, is exactly what Vision Cable did by moving a total of eight channels to allegedly unregulated packages, and in the process, eliminating an entire cable programming service tier. While we have acknowledged that aspects of our evaluation of a la carte packages were unclear,[33] as applied to these particular facts, this prong of the test is clear and requires no additional guidance or explanation from the Commission. In light of the fact that it is clear that elimination of an entire regulated tier and transformation of that tier into an a la carte package is an evasion of rate regulation, we find that Vision Cable's retiering in fact clearly constitutes just such an evasion.

23. We find that Vision Cable's SuperStation and Preferred Service packages, as the offering existed in Fort Lee, New Jersey, on December 13, 1993, the date of our LOI, must be treated as a rate-regulated cable programming service tiers. As a result, effective 90 days from the release date of this Order, Vision Cable must either offer the channels in these packages as part of the respective rate-regulated tiers from which they came or offer the channels collectively as a separate rate-regulated tier or tiers of cable programming service.[34] We further conclude that these packages are rate-regulated offerings as of September 1, 1993, and that the channels composing them must be counted as rate-regulated channels for purposes of rate justification as of that date.

V. ORDERING CLAUSES

24. Accordingly, IT IS ORDERED that Vision Cable's packages are subject to rate regulation as of September 1, 1993, and the channels composing them must be counted by Vision Cable as rate-regulated channels for purposes of rate justification, as of that date.

25. IT IS FURTHER ORDERED that, effective 90 days from the release date of this Order, Vision Cable must either offer these channels as part of the respective rate-regulated tiers from which they came or offer the channels collectively as a separate rate-regulated tier or tiers of cable programming service.

26. IT IS FURTHER ORDERED that this Order is EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[26] *Second Reconsideration Order* ¶ 196.

[27] *Id.*

[28] Vision Cable removed four of the five channels in the Preferred Service package and all four of the channels in the SuperStation Package from regulated tiers.

[29] *Second Reconsideration Order* ¶ 196.

[30] In adopting the 15 interpretive guidelines in the *Second Reconsideration Order* to supplement the *Rate Order*'s two-prong test, we hoped to enable operators to better determine what collective offerings of a la carte channels would be considered an evasion of rate regulation. *See Going Forward Order* ¶ 40.

[31] *Rate Order* ¶ 328 n.808.

[32] *Second Reconsideration Order* ¶ 196.

[33] *See Warner Cable Communications*, Milwaukee, Wisconsin, LOI-93-14, DA 94-1276 (released November 18, 1994).

[34] To provide 90 days gives Vision Cable ample time to comply with the 30 day notice provisions of our regulations for rate and programming changes. *See* 47 C.F.R. §§ 76.309(c)(3)(i)(B), 76.932 and 76.964. Vision Cable, of course, may continue to offer any channels as single channel offerings consistent with the 1992 Cable Act and our rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 93-50

In the Matter of

The Accounting and Ratemaking Treatment for the Allowance for Funds Used During Construction (AFUDC)

REPORT AND ORDER

Adopted: February 13, 1995; Released: February 28, 1995

By the Commission:

I. INTRODUCTION

1. On March 22, 1993, the Commission released a Notice of Proposed Rulemaking[1] ("the *Notice*"), proposing changes to Part 32,[2] Uniform System of Accounts ("USOA") for Telecommunications Companies, and Part 65,[3] Interstate Rate of Return Prescription Procedures and Methodologies, of our Rules with respect to the proper accounting and ratemaking treatment for Telephone Plant Under Construction ("TPUC") and Allowance for Funds Used During Construction ("AFUDC"). Specifically, we proposed to amend Part 32 to require carriers to capitalize AFUDC for TPUC using a capitalization rate based on average cost of debt. We also proposed to amend Part 65 to allow carriers to include the interstate portion of the TPUC balances in the interstate rate base and to reduce their interstate revenue requirement by the amount of AFUDC capitalized in the current year. Twelve parties filed comments, and five filed reply comments.[4] This Order amends Parts 32 and 65 of our Rules to adopt the changes as proposed in the *Notice*.[5] These changes will become effective six months after a summary of this Order is published in the Federal Register.

II. BACKGROUND

2. Our accounting rules for telephone companies require all costs associated with acquiring and readying an asset for its intended use to be capitalized as part of the asset's cost.[6] The interest expense accrued during the period in which the asset is being readied for service, which is commonly referred to as AFUDC, is one of these costs. Parts 32 and 65 of our rules specify the accounting and interstate regulatory treatment for AFUDC. In addition, in Docket No. 19129, the Commission required AT&T and the Bell System to use the prime rate in calculating AFUDC for interstate ratemaking purposes.[7]

3. The Commission has recognized three ways to compensate carriers for their investments in assets during the period in which they are being readied for service:

> **Capitalization Method**. Under this method, TPUC is excluded from the rate base during the construction period, but carriers are allowed to capitalize the interest costs, i.e., AFUDC, during that same time period. When plant is placed into service, the cost of construction, including capitalized AFUDC, is transferred from TPUC accounts to plant in service accounts and included in the rate base. Carriers are permitted to earn a return on the investment in the new plant, including the capitalized interest amount, and the cost of that investment is recovered through depreciation charges over the useful life of the plant.
>
> **Rate Base Method**. Under this method, TPUC is included in the rate base during the construction period, and interest is treated as an expense during the same time period.
>
> **Revenue Requirement Offset Method**. Under this method, TPUC is included in the rate base during the construction period and AFUDC is recognized as part of that cost of construction. To prevent double recovery, AFUDC for the current period is treated as a revenue amount for ratemaking purposes. For cost of service companies this credit reduces the carrier's revenue requirement.[8]

4. In 1967, in Docket No. 16258, the Commission required AT&T and the Bell System Companies to use the revenue requirement offset method for interstate ratemaking.[9] In 1977, in Docket No. 19129, the Commission concluded that because long-term construction projects (*i.e.*, projects under construction for one year or longer) generally benefit only future ratepayers, the costs of such projects should not be recovered from current

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[1] Accounting and Ratemaking Treatment for the Allowance for Funds Used During Construction (AFUDC), Notice of Proposed Rulemaking, CC Docket No. 93-50, 8 FCC Rcd 2084 (1993).

[2] 47 C.F.R. Part 32.

[3] 47 C.F.R. Part 65.

[4] Parties that filed comments and reply comments are listed in Appendix A.

[5] We also amend Part 36 to conform with the Part 32 and 65 rules changes adopted in this Order.

[6] Section 32.2000(c) of our Rules, 47 C.F.R. §32.2000(c), requires the telephone company to charge to the telecommunications plant accounts, where applicable, all direct and indirect costs in accounting for construction costs.

[7] American Telephone and Telegraph Co., Docket No. 19129, *Phase II Final Decision and Order*, 64 FCC 2d 1, 59-60 (1977) (*19129 Phase II Final Decision and Order*). The prime rate is defined as the lowest rate of interest charged by a lender to its best customers for short-term unsecured loans. The Commission specified in Docket No. 19129 that interest during construction be computed at a compounded annual rate that is based on a 13-month average of the prime rate.

[8] The revenue requirement offset method was adopted in American Telephone and Telegraph Co., Docket No. 19129, *Interim Decision and Order*, 9 FCC 2d 30, 41-42, *recon.*, 9 FCC 2d 960, 971-972 (1967); and the capitalization and rate base methods were adopted in *Phase II Final Decision and Order*, 64 FCC 2d at 59.

[9] American Telephone and Telegraph Co., *Interim Decision amd Order*, 9 FCC 2d at 41-42, *recon.*, 9 FCC 2d at 971-972.

ratepayers. To implement this policy, the Commission specified the use of the capitalization method to recover the costs incurred in connection with long-term construction projects. At the same time, the Commission directed carriers to compute interest at the prime rate in determining AFUDC. For short-term construction projects (*i.e.*, projects under construction for less than one year), the Commission decided that it was not necessary to distinguish between current and future ratepayers. Accordingly, the Commission specified the rate base method for short-term construction.[10] The procedures adopted in Docket No. 19129 for Bell System ratemaking are still in effect today. In 1978, the Commission amended the USOA to accommodate the Docket No. 19129 ratemaking decisions by creating separate accounts for short- and long-term construction projects.[11]

5. In 1985 the Commission revisited the accounting for AFUDC in Docket No. 84-469.[12] In that proceeding, the Commission articulated that the USOA should incorporate Generally Accepted Accounting Principles ("GAAP")[13] to the extent that GAAP is consistent with the Commission's regulatory needs. In implementing that policy, however, the Commission rejected the GAAP standard for the rate at which AFUDC is capitalized. That standard essentially requires the accrual of AFUDC at a rate based on the carrier's actual cost of debt.[14] The Commission decided that it was not necessary to require consistency with GAAP in this case because it concluded that the practical difference between the prime lending rate and the carriers' actual cost of debt would be very minor.[15]

6. On January 11, 1991, Ameritech filed a Petition for Rulemaking requesting that the Commission use the prescribed interstate rate of return, instead of the prime rate, to compute AFUDC. A Public Notice soliciting comments on the petition was issued on February 15, 1991. In reviewing the comments, the Commission determined that accounting and regulatory changes may be necessary for AFUDC. It also concluded that complementary changes in the Commission's treatment of assets during the period in which AFUDC is accrued may also be necessary. Accordingly, the Commission subsequently issued the *Notice* in which it proposed revisions to its current treatment of TPUC and AFUDC.

III. COMMENTS AND DISCUSSION

A. Methods

1. Proposal

7. In the *Notice*, we proposed the revenue requirement offset method for both short- and long-term construction projects because we believed that this method would allow us to adopt accounting that is both consistent with GAAP and fair and reasonable for ratemaking purposes. Of the thirteen commenting parties, three support the proposal,[16] and ten oppose it in varying degrees.[17]

2. Comments

8. The Florida PSC and BellSouth state that full adoption of GAAP standards for AFUDC capitalization would be preferable to the current rules. These commenters argue, however, that the revenue requirement offset method is inappropriate for today's telecommunications industry because they believe AFUDC capitalization amounts have little impact for accounting and ratemaking purposes.[18] U S West supports this position.[19] The Florida PSC also argues that the revenue requirement offset method might encour-

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[10] American Telephone and Telegraph Co., *Phase II Final Decision and Order*, 64 FCC 2d at 59.

[11] Amendment of Part 31, Uniform System of Accounts for Class A and Class B Telephone Companies, *Report and Order*, 68 FCC 2d 902 (1978) (*Amendment of Part 31*). The USOA in Part 31 was replaced by the USOA in Part 32 effective January 1, 1988. The current regulations are contained in 47 C.F.R. §32.2003 (Telecommunications plant under construction-short-term) and 47 C.F.R. §32.2004 (Telecommunications plant under construction-long-term).

[12] Revision of the Uniform System of Accounts for Telephone Companies to Accommodate Generally Accepted Accounting Principles (Parts 31, 33, 42, and 43 of the FCC's Rules), *Report and Order*, 102 FCC 2d 964, 976-78, 989 (1985).

[13] Briefly stated, GAAP is a common set of accounting concepts, standards, procedures and conventions that are recognized by the accounting profession as a whole and upon which most nonregulated enterprises base their external financial statements and reports.

[14] Statement of Financial Accounting Standards No. 34, Capitalization of Interest Cost, states:

> If an enterprise's financing plans associate a specific new borrowing with a qualifying asset, the enterprise may use the rate on that borrowing.... If average accumulated expenditures for the asset exceed the amounts of specific new borrowings associated with the asset, the capitalization rate to be applied to such excess shall be a weighted average of the rate applicable to other borrowings of the enterprise.

Under GAAP, an enterprise's current accrual for AFUDC cannot exceed the total amount of interest cost it incurs in the period.

[15] Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, *Report and Order, 3 FCC Rcd 269 (1987), recon.*, 4 FCC Rcd 1697 (1989) (*Rate Base Reconsideration Order*), *remanded on other grounds sub nom.*, Illinois Bell Tel. Co. v. FCC, 911 F.2d 776 (D.C. Cir. 1990) (*Illinois Bell I*), *Decision on Remand*, 7 FCC Rcd 296 (1991), *aff'd sub nom.*, Illinois Bell Tel. Co. v. FCC, 988 F. 2d 1254 (D.C. Cir. 1993) (*Illinois Bell II*). Thereafter, BellSouth and Southwestern Bell raised the AFUDC issue in petitions for reconsideration in the rate base proceeding, Docket No. 86-497. They objected to the use of the prime rate for accruing AFUDC. The Commission declined to address the matter on the merits at that time because the issue was beyond the scope of that proceeding. Illinois Bell appealed, but the D.C. Circuit held that the Commission was on solid ground in refusing to expand the scope of its proceeding and advised Illinois Bell that it should petition to the Commission in the usual manner if it wanted the treatment of AFUDC to be changed. *See Rate Base Reconsideration Order*, 4 FCC Rcd 1697 at 1703.

[16] Ameritech Comments at 1; NYNEX Comments at 2-3; SWBT Comments at 3.

[17] SNET Comments at 2; Wisconsin PSC Comments at 2-6; Missouri PSC Comments at 2; Bell Atlantic Comments at 1; BellSouth Comments at 1; NTCA Comments at 2; MCI Comments at 1; Florida PSC Comments at 2; NECA Comments at 2; U S West Reply Comments at 2.

[18] Florida PSC Comments at 2; BellSouth Comments at 3.

[19] U S West Reply Comments at 2.

age companies to delay the transfer of plant ready for use from the TPUC account to the plant in service account.[20] MCI argues that the Commission should continue to employ the capitalization method for long-term TPUC and should adopt it for short-term TPUC as well. MCI argues that this policy would prevent ratepayers from being charged for any investment until it is considered used and useful. The Missouri PSC opposes reliance on GAAP for AFUDC purposes because it believes that wholesale adoption of GAAP as the basis for setting rates may impose an inequitable share of the cost recovery burden on current ratepayers rather than future ratepayers.[21] SWBT, Ameritech, and NYNEX support the revenue requirement offset method. SWBT argues that this method permits the regulated entity to earn a fair rate of return on its investment by including TPUC in rate base. It states that a company incurs debt costs for both short- and long-term construction projects and that it is appropriate to capitalize these costs.[22] Ameritech contends that over 90 percent of its long-term construction projects are completed in less than two years. As a result, at any given time, current ratepayers are very likely to benefit from construction projects when the plant is placed into service.[23] NYNEX asserts that the proposal properly balances the interests of carriers and ratepayers.[24]

9. Bell Atlantic asserts that capitalizing AFUDC on short-term construction projects would increase the risk of recovering that capital. Bell Atlantic argues that, as the interest costs are capitalized, its recovery is deferred and spread over time, and the carriers might not be able to recover their total investment because of increasing competition and rapid technological changes. Bell Atlantic maintains that this would frustrate our price cap productivity incentives.[25] NECA states that it does not oppose adoption of our proposal. NECA, however, is concerned that smaller exchange carriers may incur additional bookkeeping expenses to capitalize interest expenses and may initially experience reduced settlements under the revenue requirement offset method. NECA asks the Commission to allow small carriers to continue using the rate base method for all construction where the amounts are not materialin comparison to the additional burden.[26] NTCA supports NECA's proposal and states that our AFUDC proposal would also require carriers to keep additional records related to tax timing differences associated with the interest expense. NTCA states that we should allow carriers to capitalize AFUDC but not require it if the financial reporting effect is immaterial.[27]

3. Discussion

10. We believe that the revenue requirement offset method is the best approach for several reasons. Consistent with the policy established in Docket No. 84-469, this method would incorporate into our accounting rules the methodology for treating AFUDC endorsed by GAAP for both short-term and long-term construction projects. Further, the revenue requirement offset method would give the carriers an incentive to invest in new plant because both short- and long-term plant under construction and the capitalized AFUDC would be included in rate base and, as a result, carriers would be allowed to earn a rate of return on the total investment. Moreover, under the revenue requirement offset method the amount of AFUDC capitalized is included both in the rate base and in current income for ratemaking purposes. This has the effect of mitigating the increase in the revenue requirement that results from including all TPUC in the rate base. In sum, because other methods lack these advantages, we believe that the interstate ratemaking treatment of interest expense during construction under the revenue requirement offset method is superior to the alternatives.

11. Adoption of the revenue requirement offset method will enable us to assure that carriers have an opportunity to earn the authorized rate of return on the interstate portion of all investments they make in the telephone network, while reducing the amount recovered from ratepayers for assets under construction during the period in which they are under construction. Under this approach, carriers will have an opportunity to earn a return of and on all of their investments in telephone plant, both in service and under construction, because we will allow the inclusion of all interstate TPUC and telephone plant in service in the rate base. To the extent the carrier's earned interstate rate of return exceeds its average cost of debt, the carrier will receive a return on TPUC investment during the current period, subject to applicable Commission sharing requirements and limitations on earnings in excess of the authorized rate of return. When the plant goes into service, the carrier will begin to recover, through rates charged to its customers, the entire investment, including the capitalized AFUDC, in the form of depreciation expense. This recovery will continue until the plant is fully depreciated. In addition, because of the revenue offset, interstate ratepayers will pay very little for any new plant until the plant is placed in service. Finally, using the average cost of debt to calculate AFUDC is consistent with GAAP.

12. We disagree with the assertion of the Florida PSC, BellSouth, and U S West that this method should not be used because AFUDC accruals are immaterial. AFUDC accruals are, in fact, substantial. In 1992, for example, AFUDC accruals for LECs that reported accounting data to the Commission totaled nearly $100 million, or approximately 0.7 percent of their total reported return.[28] Furthermore, in 1992 carriers only accrued AFUDC on long-term construction projects, while our new rules would require AFUDC to be accrued on both short- and long-term construction projects. Since typically LECs have three times as much invested in short-term as long-term construction projects,[29] we would expect AFUDC accruals under our proposal to amount to nearly $400 million or approximately 3 percent of their total return. In addition, we disagree with the Florida PSC's argument that the revenue requirement offset method may encourage companies to

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[20] Florida PSC Comments at 2.
[21] Missouri PSC Comments at 2 and 3.
[22] SWBT Reply Comments at 3.
[23] Ameritech Reply Comments at 2.
[24] NYNEX Comments at 3.
[25] Bell Atlantic Comments at 2-3.
[26] NECA Comments at 2.
[27] NTCA Reply Comments at 2-3.
[28] Statistics of Communications Common Carriers 1992/1993 Edition, Table 2.9 (FCC 1993).
[29] *Id.*

delay the transfer of plant from the TPUC account to plant in service accounts. On the contrary, the revenue requirement offset method gives carriers the incentive to transfer plant from construction into service as promptly as possible to avoid AFUDC revenue requirement offsets.

13. We disagree with MCI that both short- and long-term TPUC should be excluded from the rate base to prevent current ratepayers from being overcharged. Contrary to MCI's argument, the revenue requirement offset method effectively limits the amount that current ratepayers pay for assets prior to their placement into service. Under the current rules, the largest of the TPUC accounts, short-term TPUC, is included in the interstate rate base and carriers are allowed to earn the authorized rate of return on this amount without any revenue offset. The revenue requirement offset procedure will allow both long-term and short-term TPUC to be included in the rate base, but it will also require the use of the revenue offset for the total current year AFUDC. We acknowledge that in our new policy with regard to all TPUC, as in our prior policy with regard to short-term TPUC, we depart from the used and useful standard by allowing carriers to place plant in the rate base prior to its being placed in service. We believe, however, that this limited additional departure from the used and useful standard will not harm the ratepayers because for carriers as a group during each of the first few years, the revenue offset will exceed the additional revenue requirement associated with the inclusion of long-term TPUC in the rate base. The ratepayers receive the benefits of reduced rates in the initial years of implementation. In future years, the increased return and depreciation expense resulting from the inclusion of plant under construction in the rate base could exceed the amount of interest capitalized. Then the total revenue requirement for carriers as a group would exceed the level that would occur under our present requirements. Although excluding all TPUC from the rate base, as MCI suggests, would avoid this effect, we believe that such an exclusion would be unfair to carriers and that the method we are adopting best balances ratepayer and carrier interests.

14. We agree with the Missouri PSC that we should not "blindly" rely on GAAP if those accounting rules will have adverse regulatory consequences. We have determined in this instance, however, that the revenue requirement offset method of accounting for AFUDC provides adequate ratepayer protection *and* is consistent with GAAP.

15. We are not persuaded by Bell Atlantic's argument that capitalizing AFUDC on short-term construction projects would increase the risk of recovering its investment. Bell Atlantic has not quantified the amount of increased risk, nor has it provided any evidence to support its statement. Moreover, GAAP requires nonregulated companies to capitalize AFUDC on their short-term construction projects. The method for treating AFUDC adopted in this Order simply puts carriers on equal footing with nonregulated companies. In addition, we believe that our overall approach is fairer to carriers than our prior method. That is, we have changed the AFUDC rate from the prime rate to the carriers' actual cost of debt and will allow carriers to earn the authorized rate of return on their investment for the entire period for which the capital has been invested.[30]

16. We do not agree with NECA and NTCA that our proposal will add to the record-keeping burden of carriers. On the contrary, eliminating the accounting distinction between short- and long-term construction projects should reduce the overall record-keeping burden. No longer will carriers have to identify construction projects by the timing of their completion and only accrue AFUDC on specific projects. We also do not agree with NTCA's claims that our rules should be flexible to allow small carriers to use the current rate base method for all construction when the amounts are not material and that our rules should not require carriers to capitalize AFUDC if the effect is immaterial. Allowing carriers such flexibility would result in differences in AFUDC treatment among carriers. We believe that it is important to maintain consistency and uniformity among the carriers' books of accounts so that we can readily compare their regulatory operating results.

B. Capitalization Rate

1. Proposal

17. In Docket No. 19129, the Commission required AT&T and the Bell System to calculate AFUDC for interstate ratemaking purposes by applying the prime rate to the appropriate TPUC balance.[31] Our Part 32 rules, however, do not specify a capitalization rate to be used for accounting purposes. In the *Notice*, we proposed to require carriers to use their actual cost of debt to compute AFUDC for both accounting and interstate regulatory purposes.

2. Comments

18. The Wisconsin PSC suggests that we use the weighted average cost of capital, rather than the average cost of debt, as the AFUDC capitalization rate.[32] It argues that this approach would prevent the shifting of costs associated with future services to current ratepayers.[33] MCI argues that the Commission should retain the prime rate as the AFUDC capitalization rate because it would encourage timely completion of construction projects.[34] SWBT argues that generally the prime rate is lower than the carriers' average costs of debt, and, therefore, use of the prime rate would not compensate carriers adequately for the cost of new investments.[35]

3. Discussion

19. We will require each carrier to use its actual average cost of debt as its capitalization rate.[36] This standard is consistent with the requirements of GAAP and it is fair to the carriers. The Wisconsin PSC suggests that we use the average cost of capital (debt and equity) rather than the average cost of debt, to calculate AFUDC. We do not adopt

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[30] See discussion in Section III.B.

[31] *Docket No. 19129 Phase II Order*, 64 FCC 2d at 59.

[32] Wisconsin PSC Comments at 3. Wisconsin PSC indicates that this suggestion is based upon the premise that all utility assets are supported proportionately by the entire utility capital structure.

[33] Wisconsin PSC Comments at 3.

[34] MCI Comments at 7.

[35] SWBT Reply Comments at 4.

[36] If, however, a carrier borrows to finance a specific asset, the carrier can use the rate associated with the borrowing for that asset, subject to the limitations set forth in FASB 34.

this proposal because this approach is inconsistent with our goal of establishing a treatment of AFUDC that is in accordance with GAAP. Wisconsin PSC's proposal would also result in larger amounts being capitalized and recovered from both current and future ratepayers since carriers cost of equity usually exceeds their cost of debt. Under GAAP, interest costs of financing construction are recognized costs of acquiring assets and equity costs are not. Wisconsin PSC's proposal would require the carriers to capitalize equity costs that are not recognized as costs under GAAP, which would clearly violate the accounting tenet of recording assets at cost.

20. We reject MCI's argument that the use of the prime rate is necessary to encourage carriers to expedite construction projects. Our incentive regulation programs as well as those of many of the states furnish ample incentives to carriers to complete their construction projects expeditiously. Prompt completion of these projects will increase their opportunity to bring in new revenue and, thus, increase their profitability. In addition, all carriers, even those that continue under traditional rate of return regulation, will have incentives under our revenue requirement offset method to complete construction in order to avoid the revenue requirement offset.

C. Other Matters

21. As recommended by NECA, we adopt conforming amendments to Part 36 of our Rules because Section 36.222(c)[37] refers to Account 2004 which would be eliminated under the adoption of our proposal and to Account 2003 which would be revised. Since these amendments are technical corrections that will not change jurisdictional separations results, neither additional notice and comment nor a Federal-State Joint Board pursuant to Section 410(c) of the Communications Act is necessary.[38]

22. The amendments discussed herein also affect the reports that carriers file under our Automated Reporting and Management Information System ("ARMIS"). We direct the Chief, Common Carrier Bureau, to revise the affected ARMIS reports to reflect these amendments.

IV. CONCLUSION

23. For the reasons set forth above, we conclude that our accounting rules for AFUDC capitalization should be consistent with GAAP and that our ratemaking rules with respect to TPUC should be consistent with our accounting rules. Therefore, we amend Parts 32 and 65 of our Rules as set forth in Appendix B. We also make conforming amendments to Part 36 of our Rules.

V. ORDERING CLAUSES

24. Accordingly, IT IS ORDERED that, pursuant to Sections 1, 4(i), 201-205, 219, and 220 of the Communications Act of 1934, as amended, 47 U.S.C. §§151, 154(i) 201-205, 219, and 220, Parts 32, 36, and 65 of our Rules, 47 C.F.R. Parts 32, 36, and 65 ARE AMENDED, as set forth in Appendix B.

25. IT IS FURTHER ORDERED that, pursuant to Section 220(g) of the Communications Act of 1934, as amended, 47 U.S.C. §220(g) and Section 1.427(c) of the Commission's Rules, 47 C.F.R. §1.427(c), the amendments to Parts 32, 36, and 65 of the Commission's Rules, 47 C.F.R. Parts 32, 36, and 65 as set forth in Appendix B, shall be effective six months after publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

List of Respondents

Comments

Ameritech Operating Companies (Ameritech)
Bell Atlantic Telephone companies (Bell Atlantic)
BellSouth Telecommunications, Inc. (BellSouth)
Florida Public Service Commission (Florida PSC)
MCI Telecommunications Corporation (MCI)
Missouri Public Service Commission (Missouri PSC)
National Exchange Carrier Association (NECA)
National Telephone Cooperative Association (NTCA)
New England Telephone and Telegraph Company and New York Telephone Company (NYNEX)
Public Service Commission of Wisconsin (Wisconsin PSC)
Southern New England Telephone Company (SNET)
Southwestern Bell Telephone Company (SWBT)

Reply Comments

Ameritech
MCI
NTCA
SWBT
U S West Communications, Inc. (U S West)

[37] 47 C.F.R. §36.222(c).
[38] *See* 47 U.S.C. §410(c).

APPENDIX B

Parts 32, 36 and 65 of Title 47 of the CFR are amended as follows:

PART 32--UNIFORM SYSTEM OF ACCOUNTS FOR TELECOMMUNICATIONS COMPANIES

1. The authority citation for Part 32 continues to read as follows:

Authority: Secs. 4(i), 4(j) and 220 as amended; 47 U.S.C. Secs. 154(i), 154(j) and 220 unless otherwise noted.

2. Paragraph 32.2000(c)(2)(x) is revised to read as follows:

§32.2000 Instructions for telecommunications plant accounts.

* * * * *

(c) ***

(2) ***

(x) Allowance for funds used during construction ("AFUDC") provides for the cost of financing the construction of telecommunications plant. AFUDC shall be charged to Account 2003, Telecommunications Plant Under Construction, and credited to Account 7340. The rate for calculating AFUDC shall be determined as follows: If financing plans associate a specific new borrowing with an asset, the rate on that borrowing may be used for the asset; if no specific new borrowing is associated with an asset or if the average accumulated expenditures for the asset exceed the amounts of specific new borrowing associated with it, the capitalization rate to be applied to such excess shall be a weighted average of the rates applicable to other borrowing of the enterprise. The amount of interest cost capitalized in an accounting period shall not exceed the total amount of interest cost incurred by the company in that period.

* * * * *

3. Section 32.2003 is amended by revising the section heading and paragraphs (a) and (c) to read as follows:

§32.2003 Telecommunications plant under construction.

(a) This account shall include the original cost of construction projects. (Note also §32.2000(c).)

* * * * *

(c) If a construction project has been suspended for six months or more, the cost of the project included in this account shall be transferred to Account 2006, Nonoperating Plant, without further direction or approval of this Commission. If a project is abandoned, the cost included in this account shall be charged to Account 7370, Special Charges.

* * * * *

4. Section 32.2004 is removed.

5. Section 32.7340 is revised to read as follows:

§32.7340 Allowance for funds used during construction.

This account shall be credited with amounts charged to the telecommunications plant under construction account. (See §32.2000(c)(2)(x).)

PART 36--JURISDICTIONAL SEPARATIONS PROCEDURES; STANDARD PROCEDURES FOR SEPARATING TELECOMMUNICATIONS PROPERTY COSTS, REVENUES, EXPENSES, TAXES AND RESERVES FOR TELECOMMUNICATIONS COMPANIES.

1. The authority citation for Part 36 continues to read as follows:

Authority: 47 U.S.C. Secs. 151, 154(i) and (j), 205, 221(c), 403 and 410.

2. Section 36.101 is revised to read as follows:

§36.101 Section arrangement.

(a) This subpart is arranged in sections as follows:

General:

Telecommunications Plant in Service-Account 2001.	36.101 and 36.102.
General Support Facilities--Account 2110	36.111 and 36.112.
Central Office Equipment--Accounts 2210, 2220, 2230	36.121 thru 36.126.
Information Origination/Termination Equipment--Account 2310	36.141 and 36.142.
Cable and Wire Facilities--Account 2410	36.151 thru 36.157.
Amortization Assets--Accounts 2680 and 2690	36.161 and 36.162.
Telecommunications Plant--Other Accounts 2002 thru 2005	36.171.
Rural Telephone Bank Stock.	36.172.
Material and Supplies--Accounts 1220, and Cash Working Capital	36.181 and 36.182.
Equal Access Equipment.	36.191.

3. Section 36.171 is revised to read as follows:

§36.171 Property held for future telecommunications use--Account 2002; Telecommunications plant under construction--Account 2003; and Telecommunications plant adjustment--Account 2005.

The amounts carried in Accounts 2002, 2003, and 2005 are apportioned among the operations on the basis of the apportionment of Account 2001, Telecommunications Plant in Service.

4. Section 36.222(c) is revised to read as follows:

§36.222 Nonoperating income and expenses--Account 7300.

* * * * *

(c) The portion reflecting allowance for funds used during construction is apportioned on the basis of the cost of Telecommunications Plant Under Construction--Account 2003. The portion reflecting costs for social and community welfare contributions and fees is apportioned on the basis of the apportionment of corporate operations expenses.

PART 65--INTERSTATE RATE OF RETURN PRESCRIPTION PROCEDURES AND METHODOLOGIES

1. The authority citation for Part 65 continues to read as follows:

Authority: Secs. 4, 201, 202, 203, 205, 218, 403, 48 Stat., 1066, 1072, 1077, 1094, as amended, 47 U.S.C. Secs. 154, 201, 202, 203, 205, 218, 403.

2. Section 65.450(d) is revised to read as follows:

§65.450 Net Income.

* * * * *

(d) Except for the allowance for funds used during construction, reasonable charitable deductions and interest related to customer deposits, the amounts recorded as nonoperating income and expenses and taxes (Accounts 7300-7450) and interest and related items (Accounts 7500-7540) and extraordinary items (Accounts 7600-7640) shall not be included unless this Commission specifically determines that particular items recorded in those accounts shall be included.

3. Section 65.820(a) is revised to read as follows:

§65.820 Included items.

(a) *Telecommunications Plant.* The interstate portion of all assets summarized in Account 2001 (Telecommunications Plant in Service) and Account 2002 (Property Held for Future Use), net of accumulated depreciation and amortization, and Account 2003 (Telecommunications Plant Under Construction), and, to the extent such inclusions are allowed by this Commission, Account 2005 (Telecommunications Plant Adjustment), net of accumulated amortization. Any interest cost for funds used during construction capitalized on assets recorded in these accounts shall be computed in accordance with the procedures in §32.2000(c)(2)(x) of this chapter.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-114

In the Matter of

Amendment of Section 73.202(b), RM-8515
Table of Allotments,
FM Broadcast Stations.
(Ettrick, Virginia)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 15, 1995 Released: February 28, 1995

By the Chief, Allocations Branch:

1. At the request of Hoffman Communications, Inc. ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 9 FCC Rcd 5711, (1994), proposing the allotment of Channel 226A to Ettrick, Virginia, as the community's first local aural transmission service. Ettrick Radio Company ("Ettrick Radio") filed comments. Petitioner filed comments restating its interest to apply for Channel 226A, if allotted.

2. In the *Notice*, petitioner was requested to furnish sufficient information to support a finding that Ettrick is a community for allotment purposes. In response, petitioner states that Ettrick is a Census Designated Place ("CDP") with a 1990 U.S. Census population of 5,290 persons and is depicted on a map in the Rand McNally Road Atlas and is listed in the Rand McNally Commercial Atlas and Marketing Guide as a "banking Town". Petitioner notes that Ettrick is home of Virginia State University which has a college population of 4,000 persons. Further, petitioner points out that the community has its own post office, fire department and a number of businesses and/or organizations, some of which identify themselves with the community of Ettrick, such as the Ettrick Business Council, Ettrick on the Move Committee, Ettrick Elementary School, Ettrick United Methodist Church, Ettrick Supermarket and Ettrick Riverside Park. Ettrick Radio also supports the allotment of Channel 226A to Ettrick, stating that Ettrick has sufficient indicia of being a community to warrant allotment of an FM channel.

3. Based on the record before us, we find that the petitioner has persuasively shown that Ettrick is a community for allotment purposes. It has its own fire department as well as civil organizations and businesses which identify themselves with Ettrick. We therefore believe that the public interest would be served by allotting Channel 226A to Ettrick as its first local aural transmission service.

4. Channel 226A can be allotted to Ettrick in compliance with the Commissions minimum distance separation requirements with a site restriction of 12.3 kilometers (7.6 miles) northwest in order to avoid a short-spacing conflict with Station WFOG(FM), Channel 225B, Suffolk, Virginia.[1]

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 14, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Ettrick, Virginia	226A

6. The window period for filing applications will open on **April 14, 1995**, and close on **May 15, 1995**.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Pam Blumenthal, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 226A at Ettrick are North Latitude 37-17-53 and West Longitude 77-32-53.

Before the
Federal Communications Commission
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

MM Docket No. 94-112

In the Matter of

Amendment of Section 73.202(b), RM-8516
Table of Allotments,
FM Broadcast Stations.
(Farmville, Virginia)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 21, 1995; Released: February 28, 1995

By the Chief, Allocations Branch:

1. At the request of Farmville Herald, Inc. ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 9 FCC Rcd 5315 (1994), proposing the allotment of Channel 225A to Farmville, Virginia, as the community's third local FM commercial service. Petitioner filed comments restating its intention to apply for Channel 225A, if allotted. No other comments were received.

2. We believe the public interest would be served by allotting Channel 225A to Farmville, since it could provide the community with an additional local FM service. Channel 225A can be allotted to Farmville in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 14, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Farmville, Virginia	225A, 239B 267A

4. The window period for filing applications will open on **April 14, 1995**, and close on **May 15, 1995**.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Pam Blumenthal, Mass Media Bureau, (202) 418-2180.

[1] The coordinates for Channel 225A at Farmville are North Latitude 37-18-00 and West Longitude 78-23-48.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Ameritech Operating Companies
Revisions to Tariff Transmittal Nos. 846, 859
F.C.C. No. 2

Bell Atlantic Telephone Companies
Revisions to Tariff Transmittal No. 725
F.C.C. No. 1

BellSouth Telecommunications, Inc.
Revisions to Tariff Transmittal No. 248
F.C.C. No. 1

Cincinnati Bell Telephone Co.
Revisions to Tariff Transmittal No. 673
F.C.C. No. 35

GTE Telephone Operating Companies
Revisions to Tariff Transmittal Nos. 937, 938
F.C.C. No. 1

GTE System Telephone Companies
Revisions to Tariff Transmittal Nos. 131, 135
F.C.C. No. 1

NYNEX Telephone Companies
Revisions to Tariff Transmittal Nos. 329, 357
F.C.C. No. 1

Pacific Bell
Revisions to Tariff Transmittal No. 1764
F.C.C. No. 128

Rochester Telephone Corporation
Revisions to Tariff Transmittal Nos. 3, 4
F.C.C. No. 1

Southern New England Telephone Co.
Revisions to Tariff Transmittal No. 636
F.C.C. No. 39

Southwestern Bell Telephone Co.
Revisions to Tariff Transmittal Nos. 2405, 2408
F.C.C. No. 73

United Telephone Company and
Central Telephone Company Transmittal No. 24
Revisions to Tariff
F.C.C. No. 1

US West Communications, Inc.
Revisions to Tariff Transmittal No. 570
F.C.C. No. 5

ORDER

Adopted: January 26, 1995; Released: January 26, 1995

By the Acting Chief, Tariff Division, Common Carrier Bureau:

I. INTRODUCTION

1. In the summer of 1994, the local exchange carriers (LECs) captioned above filed petitions for waiver of Part 69 of the Commission's Rules, 47 C.F.R. Part 69, to establish one or more new rate elements for 500 access service.[1] The Common Carrier Bureau (Bureau) granted those waiver petitions on November 30, 1994.[2] These LECs have now filed tariffs for 500 access service pursuant to the waivers they were granted in the *500 Access Waiver Order*.[3] Two parties, MCI Telecommunications Corporation (MCI) and Sprint Communications Company, L.P. (Sprint), filed petitions to reject or suspend and investigate several of those tariff filings,[4] and each carrier filed an opposition to those petitions.[5] In this Order, we deny the petitions against these 500 access service tariffs, and allow those tariffs to take effect on January 28, 1995, as scheduled.

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[1] Ameritech Operating Companies, *et al.*, Petitions for Waiver of Sections 69.4(b) and 69.106 of Part 69 of the Commission's Rules, DA 94-1350 (Com. Car. Bur., released Nov. 30, 1994), *app. for review pending* (*500 Access Waiver Order*).

[2] *Id.*

[3] In addition to Transmittal 357, which the NYNEX Telephone Companies (NYNEX) filed following the grant of its waiver petition, NYNEX had previously filed Transmittal No. 329 to introduce what it calls "Limited Access Screening Service" within the 500 Service Access Code. NYNEX Telephone Companies, Transmittal No. 329, filed September 8, 1994. MCI filed a petition to reject or suspend and investigate Transmittal 329 on September 23, 1994, which NYNEX opposed on October 3, 1994. Because NYNEX Transmittal 357 revises Transmittal 329 substantially, we conclude that the issues raised by MCI regarding Transmittal 329 in its September 8 petition are moot. Neither MCI nor Sprint filed a petition against NYNEX Transmittal 357, and our review of Transmittal 357 has revealed nothing that warrants rejection or suspension and investigation of that transmittal at this time.

[4] Those petitions to reject or suspend and investigate are listed in Appendix A.

[5] Rochester Telephone Corporation (Rochester) filed its opposition to MCI's petition to reject or suspend and investigate Rochester Transmittal No. 3 on January 11, 1995, two days after its' opposition was due. Rochester also filed a motion for leave to file its opposition out of time. Motions for extension of time are not to be granted routinely. *See* Section 1.46(a) of the Commission's Rules, 47 C.F.R. § 1.46(a). In this case, however, it appears that Rochester's relatively short delay in filing its opposition did not prejudice any other party in this proceeding. Accordingly, we grant Rochester's motion.

II. BACKGROUND

2. LECs provide 500 access service to customers providing 500 service to end users. 500 service is a new "follow me" personal communications service which enables customers, among other things, to instruct their 500 service providers where to route their calls, *e.g.*, to landline or cellular telephones, to pagers, or to voice messaging services.[6] In providing 500 access service, the LECs must screen the first six digits of the ten digit 500 number (*i.e.*, 500-NXX) in order to identify and route calls to the subscriber's designated 500 service provider.[7] There are two ways that a LEC can perform this six-digit screening and routing. First, the carrier can use switch-based translation, in which case it deploys a translation table contained in the software of the LEC switches, located at either the end office or the access tandem, to route the call to the subscriber's 500 service provider.[8] Alternatively, if the LEC's end office or access tandem has Advanced Intelligent Network (AIN) capability, the LEC launches a query to a centralized AIN database to identify the 500 service provider and routing.[9]

3. The Bureau did not impose a uniform rate structure for 500 access service on the LECs, because such a uniform rate structure would force some carriers into rate structures unrelated to the way they incur costs, and a uniform rate structure might have delayed the availability of 500 service.[10] Accordingly, LECs were granted waivers to establish rate structures to recover the costs of providing 500 access service consistently with the way they incur those costs. Specifically, LECs planning to use switch-based translation were granted waivers to establish one or more nonrecurring charges for 500 access service.[11] LECs planning to use AIN-based translation were permitted to establish recurring charges for their 500 access services, and could at their option establish a small nonrecurring charge to recover small customer-specific nonrecurring costs.[12] Similarly, LECs that intended to use switch-based translation initially, in whole or in part, but expected to begin converting to AIN some time in 1995, were granted waivers to establish either recurring charges or a combination of recurring and nonrecurring charges.[13] Finally, the Bureau declined to grant a blanket waiver to all other LECs, but stated that other LECs seeking a waiver comparable to any of the waivers granted in the *500 Access Waiver Order* would warrant "expedited consideration."[14]

III. SUMMARY OF PLEADINGS

A. Ameritech Transmittal No. 846

4. Sprint claims Ameritech's 0+500 Activation Charge of $600 is excessive given that Ameritech's 1+500 Activation Charge is $35.00.[15] Similarly, MCI asserts that Ameritech's 500 activation charge in excessive when compared to Ameritech's 900 activation charge.[16] MCI also argues that the LECs' 500 access labor costs should go down as LECs gain experience and become more efficient in providing 500 access service. MCI criticizes Ameritech for not reflecting these efficiency gains in its labor cost projections.[17] Finally, MCI asserts that Ameritech's estimate of the cross-elastic effects of 500 access service, required by Section 61.49(h)(1)(ii) of the Commission's Rules, 47 C.F.R. § 61.49(h)(1)(ii), is unreasonably low in light of Pacific Bell's estimate.[18]

5. Ameritech explains that its 0+ translation subsequent order charge is more expensive because this function requires Ameritech to remove existing routing instructions from all central offices and then reinstall the 0+ routing instructions.[19] In response to MCI's comparison of Ameritech's 500 activation rates with its 900 activation rates, Ameritech asserts that it plans to increase its 900 activation rates to bring them more in line with the 500 activation rates proposed in its transmittal before us now.[20] Ameritech also argues that comparing rates for different services cannot form a basis for alleging unreasonable discrimination.[21] Ameritech maintains that its labor force has developed experience activating 900 NXX codes, that this experience is applicable to 500 activation, and therefore MCI's argument on labor efficiency gains is speculative.[22] Ameritech claims that its cross-elasticity estimate is reasonable, because Ameritech plans to apply existing switched access charges in addition to its 500 charges. Thus, according to Ameritech, any migration from other switched access services to 500 access services will not affect total switched access demand.[23] Ameritech contends that this is consistent with Pacific Bell's projections.[24]

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[6] *500 Access Waiver Order* at paras. 2-3.

[7] *500 Access Waiver Order* at para. 3. The 500 service provider, using database technology, will then route the call to the telephone or other device designated by the 500 service subscriber. *Id.*

[8] *Id.* at para. 4.

[9] *Id.*

[10] *Id.* at para. 27.

[11] *500 Access Waiver Order* at para. 29. Those LECs include the Ameritech Operating Companies (Ameritech); Cincinnati Bell Telephone Co. (Cincinnati Bell); GTE Telephone Operating Companies (GTOC) and GTE System Telephone Companies (GSTC) (together, GTE); Pacific Bell; Rochester; and United Telephone Company and Central Telephone Company (together, United).

[12] *Id.* at para. 28. These LECs are the Bell Atlantic Telephone Companies (Bell Atlantic) and Southern New England Telephone Co. (SNET). In addition, the Bureau granted GTE a waiver to establish this rate structure if and when it shifts to AIN. *See id.* at para. 7; para. 29 n.75.

[13] *Id.* at para. 30. Those LECs are NYNEX; BellSouth Telecommunications, Inc. (BellSouth); Southwestern Bell Telephone Co. (Southwestern Bell); and US West Communications, Inc. (US West). Specifically, BellSouth and NYNEX were permitted to establish recurring charges, and Southwestern Bell and US West were permitted to establish both recurring and nonrecurring charges. *Id.*

[14] *500 Access Waiver Order* at para. 31.

[15] Sprint December 19 Petition at 9.

[16] MCI December 19 Petition at 7-8.

[17] *Id.* at 8-9.

[18] *Id.* at 11-12.

[19] Ameritech Opposition at 3.

[20] *Id.* at 1.

[21] *Id.* at 1-2.

[22] *Id.* at 2.

[23] *Id.* at 2-3.

[24] *Id.* at 3, *citing* Pacific Bell Transmittal No. 1764, Description and Justification (D&J) at 6.

B. Bell Atlantic Transmittal No. 725

6. According to Sprint, Bell Atlantic states that it will apply its 500 charges on a per query basis in some parts of its tariff, and on a "per call delivered" basis in other parts of its tariff. Sprint argues that this ambiguity should be corrected.[25] Sprint favors applying the charge on a per call delivered basis, because that would make it easier for interexchange carriers to audit and verify the LECs' billings for access services.[26] Sprint notes that Bell Atlantic's 500 access service rate is almost three times as high as its 800 database service rate. Sprint argues that a rate based in part on switch-based costs should be lower than a rate based exclusively on AIN costs.[27]

7. MCI asserts that Bell Atlantic has failed to show the cross-elastic effects of 500 access service, as required by Section 61.49(h)(1)(ii).[28] MCI also claims that Bell Atlantic's demand estimate, based on the present value of demand for a five-year period, raises several concerns. First, MCI claims that Bell Atlantic should explain its use of present value factors to adjust future demand rather than future income.[29] Second, MCI argues that Bell Atlantic should justify its estimate of three minutes as the average call length on which it bases its per query rate.[30] Third, MCI maintains that Bell Atlantic could have manipulated its demand estimate for the representative 12-month period, by basing it on either a weighted average or an arithmetic average of demand for the five year period, or by allocating costs on an actual demand basis while calculating per unit costs on a present value of demand basis.[31] MCI advocates using a weighted average to calculate demand for the representative 12-month period because MCI believes that demand for 500 access service will be greater in the later part of the five year period.[32]

8. Bell Atlantic argues that 500 service is not "like" 800 service within the meaning of Section 202 of the Communications Act.[33] Bell Atlantic also contends that demand projections for 500 and 800 service are different, and that the costs for the services are different because the AIN database used for 500 service is different from the 800-specific database used for 800 service.[34] Bell Atlantic maintains that, if 500 service were like 800 service, the rate disparity between 500 service and 800 service would be justified by differences in costs and demand characteristics.[35] According to Bell Atlantic, MCI has not shown that Bell Atlantic's estimated average call length or its levelized average demand are inaccurate.[36] Bell Atlantic also contends that its tariff clearly states that it will apply its charge on a per call delivered basis.[37] Bell Atlantic denies that it will experience any significant cross-elastic effects in providing 500 access service.[38] Finally, Bell Atlantic replies to MCI that it calculated its demand estimates in a way that will be consistent with other services that will use the AIN database.[39]

C. BellSouth Transmittal No. 248

9. Sprint argues that BellSouth's recurring 500 query charge is much higher than the charges proposed by Southwestern Bell and US West.[40] Sprint also contends that BellSouth's 500 recurring charge of $0.01 per query is unreasonably high relative to BellSouth's 800 query charge of $0.00381.[41] Sprint asserts that this is especially unreasonable given that BellSouth expects its nonrecurring costs for switch-based translation to be $16,150.29.[42]

10. MCI maintains that BellSouth's estimate of the labor time required to activate a 500 NXX code is significantly higher than the estimates of Ameritech, Cincinnati Bell, United, and US West.[43] MCI also asserts that the 12-month period for which BellSouth estimated demand is not a "representative" 12-month period as required by the Commission's Rules, and in this case this causes BellSouth's demand estimates to be unreasonably low.[44]

11. BellSouth contends that its 500 rates are not unreasonable simply because other LECs plan to charge lower rates.[45] BellSouth also argues that it has incurred costs in introducing 500 access service that it did not incur when it introduced 800 database service, because the 800 service access code (SAC) was already defined in BellSouth's switches.[46] BellSouth also contends that its 500 access rate is higher because it anticipates lower demand for 500 service than it has experienced for 800 database service.[47] BellSouth states that its overhead loadings are not unreasonable.[48] BellSouth also contends that other LECs establish separate charges for "route pattern" activity, while BellSouth includes the time for that activity in its NXX activation rate element.[49] BellSouth believes that its first year of projected demand is a "representative 12-month period."[50] BellSouth denies that it will experience any significant cross-elastic effects in providing 500 access service.[51]

D. Cincinnati Bell Transmittal No. 673

12. MCI claims that Cincinnati Bell's projected labor time and labor rate is higher than that of the average of similar LECs.[52] MCI argues that this seems unreasonable given that Cincinnati Bell's service region is smaller than that of other LECs who have filed 500 access tariffs.[53] MCI also argues that the LECs' 500 access labor costs should go

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25 Sprint December 29 Petition at 1-2.
26 *Id.* at 2.
27 *Id.* at 2-3.
28 MCI December 29 Petition at 9-10.
29 *Id.* at 11.
30 *Id.* at 12.
31 *Id.* at 12-13.
32 *Id.* at 13-14.
33 Bell Atlantic Opposition at 2.
34 *Id.* at 2-3.
35 *Id.* at 3-4.
36 *Id.* at 4-5.
37 *Id.* at 5-6.
38 *Id.* at 6.
39 *Id.*at 6-7.
40 Sprint December 19 Petition at 7.
41 *Id. See also* MCI December 20 Petition at 3-4 (difference between BellSouth's 500 rate and 800 rate is unreasonable discrimination in violation of Section 202 of the Communications Act).
42 Sprint December 19 Petition at 7-8, *citing* BellSouth Transmittal No. 248 D&J, App. B at Worksheet 2.
43 MCI December 20 Petition at 4.
44 *Id.* at 5-6. *See* Section 61.49(h)(1) of the Commission's Rules, 47 C.F.R. 61.49(h)(1).
45 BellSouth Opposition at 2.
46 *Id.* at 2-3.
47 *Id.* at 3.
48 *Id.* at 3-4.
49 *Id.* at 4-5.
50 *Id.* at 5.
51 *Id.* at 6.
52 MCI December 21 Petition at 3-4.
53 *Id.* at 4-5.

down as LECs gain experience and become more efficient in providing 500 access service. MCI criticizes Cincinnati Bell for not reflecting these efficiency gains in its labor cost projections.[54] Finally, MCI criticizes Cincinnati Bell for failing to show the cross-elastic effects of 500 access service on its existing price cap baskets.[55]

13. Cincinnati Bell suggests that it is misleading to compare its rates with the rates of other LECs who recover costs in part through recurring and in part through nonrecurring charges.[56] Cincinnati Bell also argues that its labor time is not unreasonable simply because other LECs have projected shorter labor times, and contends that 500 access using switch-based translation is very labor-intensive.[57] Cincinnati Bell alleges that it used the same labor rate to develop 500 access costs as it does to develop costs for other services.[58] Cincinnati Bell denies that it will gain measurable efficiencies or experience any significant cross-elastic effects in providing 500 access service in the future.[59]

E. GTOC Transmittal No. 937 and GSTC Transmittal No. 31

14. MCI asserts that GTE plans to charge almost twice as much for each additional 500-NXX activation/deactivation as it does for the same function for 900 access service. MCI maintains that this represents unreasonable discrimination.[60] Also, MCI contends that the first year of service is not a "representative" 12-month period on which to base demand projections. According to MCI, demand is likely to grow more rapidly after the first year, and LECs are likely to become more efficient at activating and deactivating 500-NXX codes as they gain experience providing the service.[61]

15. GTE contends that, if one assumes three "additional activations" for each "initial activation," then GSTC's 500 rates are similar to its 900 rates.[62] GTE asserts that there will be no cross-elastic effects in its provision of 500 service.[63] Finally, GTE considers the first year of service to be a "representative 12-month period" within the meaning of Section 61.49(h) of the Commission's Rules.[64]

F. Pacific Bell Transmittal No. 1764

16. Sprint contends that Pacific Bell's nonrecurring charges are excessive when compared to nonrecurring charges proposed by US West, BellSouth, Cincinnati Bell, and United.[65] MCI asserts that Pacific Bell's 500 activation charge is excessive when compared to Pacific Bell's 900 activation charge.[66] MCI claims that Pacific Bell fails to base its rates on a representative 12-month period.[67] MCI also criticizes Pacific Bell for assuming that it will experience 500 access demand in 497 central offices, rather than a limited number of offices in urban areas.[68] Finally, MCI criticizes Pacific Bell for estimating 90 percent cross-elasticity and not reflecting this demand shift in its existing price cap baskets.[69]

17. Pacific Bell argues that it is reasonable for its 500 access nonrecurring charges to be higher than those of other carriers. First, Pacific Bell argues that it plans to recover all its costs through a nonrecurring charge, while US West plans to recover only a portion of its costs through nonrecurring charges.[70] Second, Pacific Bell asserts that labor rates in its region are higher than in other regions, and that the amount of labor required varies greatly by switch type.[71]

18. In response to MCI, Pacific Bell denies that 500 activation is comparable to 900 activation for rate purposes.[72] Pacific Bell states that it does base its rates on a representative 12-month period.[73] Pacific Bell also states that to provide 500 access service only in urban areas would reduce its $163 rate by only $2.39 per switch per code, and would make the service unavailable in most of Pacific Bell's service region.[74] Pacific Bell further argues that its rates are based on unit costs that do not vary with demand.[75] Finally, Pacific Bell states that it expects its shifts in demand to occur more than 12 months after the introduction of 500 service, and claims that it will reflect the cross-elastic effects in its 1996 annual access filing.[76]

G. Rochester Transmittal Nos. 3 and 4

19. MCI asserts that Rochester has failed to show the cross-elastic effects of 500 access service, as required by Section 61.49(h)(1)(ii).[77] MCI also criticizes Rochester for not basing its demand estimates on a representative 12-month period.[78] It maintains that Rochester has not adequately explained non-standard customer routing, or the charges that would be applicable to non-standard customer routing.[79] MCI claims that Rochester's nonrecurring charges for 500 access service are discriminatory because they are higher than its nonrecurring charges for 900 access service.[80]

20. Rochester states that its rates are based on unit costs,

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54 *Id.* at 5.
55 *Id.* at 5-6.
56 Cincinnati Bell Opposition at 2.
57 *Id.* at 2-3.
58 *Id.* at 3-4.
59 *Id.* at 4.
60 MCI January 3 Petition at 4-5.
61 *Id.* at 6-7.
62 GTE Opposition at 2-3 and Att. I.
63 *Id.* at 3.
64 *Id.* at 3-4.
65 Sprint December 19 Petition at 6-7.
66 MCI December 19 Petition at 7-8. In a letter submitted on January 5, 1995, MCI contends that the 900 access service provisioning and description in Pacific Bell's tariff now is virtually the same as the 500 access service provisioning and description in Pacific Bell's Transmittal 1764. Letter from Christopher Bennett, Analyst, MCI Telecommunications Corporation, to Acting Secretary, Federal Communications Commission, January 5, 1995 (*January 5 Letter*).
67 MCI December 19 Petition at 9.
68 *Id.* at 9-11.
69 *Id.* at 12.
70 Pacific Bell Opposition at 1-2.
71 *Id.* at 2.
72 *Id.* at 2-3.
73 *Id.* at 3-4.
74 *Id.* at 4-6.
75 *Id.* at 6.
76 *Id.* at 6-7.
77 MCI December 29 Petition at 9-10.
78 *Id.* at 10-11.
79 *Id.* at 14.
80 *Id.* at 15-16.

and therefore are not sensitive to demand.[81] Rochester claims that, unlike a recurring charge, demand estimates are not necessary to determine whether its nonrecurring charges are reasonable.[82] Rochester denies that it will experience any significant cross-elastic effects in providing 500 access service.[83] Finally, in response to MCI's criticism of Rochester's non-standard customer routing charges, Rochester explains that this charge will apply where a specific access customer requests a routing arrangement that differs from the standard arrangements that Rochester offers.[84]

H. SNET Transmittal No. 636

21. Sprint observes that SNET's planned charge of $0.015 per query is substantially higher than any 500 per query charge planned by any other LEC.[85] Sprint notes that SNET's 500 access service rate is almost three times as high as its 800 database service rate. Sprint argues that a rate based in part on switch-based costs should be lower than a rate based exclusively on AIN costs.[86] Finally, Sprint notes that SNET plans to impose its charge regardless of whether the associated call is delivered. Sprint contends that this is unreasonable given that most other LECs plan to impose their charges on a per call delivered basis, and a per call delivered basis would make it easier for interexchange carriers to audit and verify the LECs' billings for access services.[87]

22. MCI asserts that SNET has failed to show the cross-elastic effects of 500 access service, as required by Section 61.49(h)(1)(ii).[88] MCI also criticizes SNET for not basing its demand estimates on a representative 12-month period.[89] MCI believes that SNET's inclusion of billing costs in its 500 access rates is inconsistent with the Commission's detariffing of billing and collection services.[90] MCI claims that SNET's recurring rates for 500 access service are discriminatory because they are higher than its recurring rates for 800 access service.[91]

23. SNET lists several reasons why it believes that its 500 access rates should not be expected to be equal to its 800 database rates. SNET states that it maintains its own AIN database, while the 800 database is maintained by a national database management group.[92] SNET also argues that projected demand for 800 database service was much greater than 500 access service.[93] SNET also contends that the Commission required 800 database service to be treated as a restructure under the price cap rules, while 500 access service is a new service.[94]

24. SNET further argues that a per-query rate structure for 500 access service is consistent with the rate structure for 800 database and Line Information Database (LIDB) services, and that Sprint has not explained its anticipated audit problems.[95] SNET denies that it will experience any significant cross-elastic effects in providing 500 access service.[96] SNET states that it incurred costs in revising its billing system for 500 access service, and asserts that MCI is mistaken in concluding that those costs are detariffed billing and collection costs.[97] Finally, SNET maintains that MCI could have derived SNET's cost projections from data provided in its cost support.[98]

I. Southwestern Bell Transmittal Nos. 2405 and 2408

25. MCI contends that Southwestern Bell's overhead cost loadings for 500 access service are unreasonable, because the ratio of rate to direct cost is 15 to 1.[99] MCI also asserts that Southwestern Bell has failed to show the cross-elastic effects of 500 access service, as required by Section 61.49(h)(1)(ii).[100]

26. Sprint maintains that Southwestern Bell has not adequately explain the portion of its 500 costs attributable to switch-based translation, and the portion attributable to AIN.[101] According to Sprint, recovery of any switch-based costs through a recurring charge would be inconsistent with the *500 Access Waiver Order*.[102] Sprint contends that Southwestern Bell's rate structure is likely to overrecover nonrecurring costs after 500 access service is incorporated into its price cap basket. Sprint recommends that Southwestern Bell recover its nonrecurring costs through a nonrecurring charge, and its recurring costs through a recurring charge.[103] Sprint also maintains that Southwestern Bell's demand estimates are unreasonably low.[104]

27. According to Southwestern Bell, the direct cost ratio in its D&J is based exclusively on AIN direct costs, and if Southwestern Bell had considered direct costs associated with both AIN and switch based translation, the direct cost ratio would be 1.015 to 1.[105] Southwestern Bell denies that there will be any cross-elastic effects, because both access for 500 calls and access "normal" 1+ and 0+ calls are switched access services.[106] Southwestern Bell denies that it based any of its per query demand estimate on its estimate for demand for NXX translations.[107] Southwestern Bell also contends that the *500 Access Waiver Order* permitted Southwestern Bell to recover its costs through a recurring

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81 Rochester Opposition at 1-2.
82 *Id.* at 2 n.5. On January 26, 1995, Rochester filed Transmittal No. 4 which, among other things, provided demand projections as required by the Commission's Rules.
83 Rochester Opposition at 2 n.5.
84 *Id.* at 2.
85 Sprint December 29 Petition at 3-4.
86 *Id.* at 4.
87 *Id.* at 4-5.
88 MCI December 29 Petition at 9-10.
89 *Id.* at 10-11.
90 *Id.* at 14-15.
91 *Id.* at 15-16.
92 SNET Opposition at 3.
93 *Id.* at 3.
94 *Id.* at 3-4.
95 *Id.* at 4.
96 *Id.* at 5.
97 *Id.* at 5.
98 *Id.* at 5-6 and Exh. 1.
99 MCI December 19 Petition at 6-7.
100 *Id.* at 11-12.
101 Sprint December 19 Petition at 2-3.
102 *Id.* at 3, *citing 500 Access Waiver Order* at paras. 26-27.
103 Sprint December 19 Petition at 5-6.
104 *Id.* at 3-4.
105 Southwestern Bell Opposition at 1-2, *citing* Southwestern Bell Transmittal No. 2408 D&J at Figure 2.
106 Southwestern Bell Opposition at 2-3.
107 *Id.* at 3.

charge, and accuses Sprint of attempting to reopen an issue already decided.[108] Finally, Southwestern Bell claims that it complied with the new service cost support rules.[109]

J. United Transmittal No. 24

28. MCI claims that United's rates for 500 access service are discriminatory because they are higher than its rates for 900 access service.[110] MCI also criticizes United for not basing its demand estimates on a representative 12-month period, and for failing to show the cross-elastic effects of 500 access service on its existing price cap baskets.[111]

29. United explains that its 900 access rates reflect jurisdictional separations factors in effect when its 900 service tariff was filed in 1988.[112] United also contends that the difference between its 900 and 500 rates is much less than was suggested by MCI.[113] United asserts that it did provide a cost study, and maintains that it did not provide an estimate for the number of NXX activations because the only customer who has expressed interest in 500 access service did not provide this information until after United filed its tariff.[114] Finally, United expects no cross-elastic effects from 500 service. According to United, parties placing 500 calls will be able to reach the called party in situations in which the called party could not be reached using other calling methods. Thus, there will be a net increase in both terminating minutes and 500 access minutes and no shift from other services to 500 service.[115]

K. US West Transmittal No. 570

30. Sprint criticizes US West for comparing its 500 access service overhead loading factor to overhead loadings for the Traffic Sensitive basket, rather than the database access sub-basket.[116] Sprint also contends that US West's per query 500 rate is unreasonably high relative to its 800 query rate.[117] Similarly, MCI claims that US West's rates for 500 access service are discriminatory because they are higher than its rates for 900 access service.[118] MCI contends that the rates and cost support in US West's Transmittal No. 525, which was US West's initial attempt to establish rates for 500 access service, are inconsistent with the rates and cost support in its tariff filing before us now.[119] MCI also criticizes US West for not basing its demand estimates on a representative 12-month period, and for failing to show the cross-elastic effects of 500 access service on its existing price cap baskets.[120]

31. US West explains that it incurs more costs in providing 500 access than it does in providing 800 database service. This is because US West maintains its own switch-based translation tables and AIN database, while the 800 database is maintained by a national database management group.[121] US West also claims that comparisons between 500 access service and 900 access service are not relevant, because 900 service does not require a database.[122] US West argues that the traffic sensitive category is appropriate basis on which to judge its 500 access overhead loadings, because 500 access investment and expense will be placed in that basket. US West denies that the database access service category is appropriate for 500 access service.[123] US West attaches as Exhibit A demand projections for the first 12 months of service, and does not expect dramatic growth in 500 access demand, or cross-elastic effects, as does MCI.[124] Finally, US West explains that the rates in its Transmittal No. 570 are lower than they were in its Transmittal No. 525 because they are based on updated and more accurate cost support information.[125]

IV. CONCLUSION AND ORDERING CLAUSES

32. We have reviewed the tariffs filed by the carriers captioned above, as well as all associated tariff revisions and pleadings. We conclude that none of those tariffs are patently unlawful so as to warrant rejection, and that an investigation is not warranted at this time.

33. Accordingly, IT IS ORDERED that the petitions for rejection or suspension and investigation filed by MCI Telecommunications Corporation and Sprint Communications Company, L.P., listed in Appendix A to this Order, ARE DENIED.

34. IT IS FURTHER ORDERED that the petition for rejection or suspension and investigation filed by MCI Telecommunications Corporation, against NYNEX Telephone Companies, Tariff F.C.C. No. 1, Transmittal No. 329, IS DISMISSED AS MOOT.

35. IT IS FURTHER ORDERED that the motion for leave to file out of time, filed by Rochester Telephone Corporation, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Geraldine . Matise
Acting Chief, Tariff Division
Common Carrier Bureau

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108 *Id.* at 4, *citing 500 Access Waiver Order* at para. 30.
109 Southwestern Bell Opposition at 4.
110 MCI December 22 Petition at 5-6.
111 *Id.* at 7-8.
112 United Opposition at 1.
113 *Id.* at 2.
114 *Id.*
115 *Id.* at 2-3.
116 Sprint December 19 Petition at 8.
117 *Id.* at 8-9.
118 MCI December 22 Petition at 5-6.
119 *Id.* at 6. MCI notes that US West Transmittal No. 525 was rejected for reasons other than inadequate cost support. *Id.*, *citing* US West Communications, Inc., Revisions to Tariff F.C.C. No. 5, 9 FCC Rcd 5228 (Com. Car. Bur. 1994).
120 MCI December 22 Petition at 8-9.
121 US West Opposition at 3-5.
122 *Id.* at 6-7.
123 *Id.* at 7-8.
124 *Id.* at 8-9.
125 *Id.* at 9.

APPENDIX A

Parties filing Petitions to Reject or Suspend and Investigate 500 Access Tariffs

Petition	Tariffs
1. MCI December 19 Petition:	Ameritech 846; Pacific Bell 1764; and Southwestern Bell 2405 and 2408.
2. Sprint December 19 Petition:	Ameritech 846; Pacific Bell 1764; Southwestern Bell 2405 and 2408; BellSouth 248; and US West 570.
3. MCI December 20 Petition:	BellSouth 248.
4. MCI December 21 Petition:	Cincinnati Bell 673.
5. MCI December 22 Petition:	United 24 and US West 570.
6. MCI December 29 Petition:	Bell Atlantic 725; Rochester 3; and SNET 636.
7. Sprint December 29 Petition:	Bell Atlantic 725 and SNET 636.
8. MCI January 3 Petition:	GTE Telephone Operating Companies 937 and GTE System Telephone Companies 131.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: January 26, 1995

CORRECTION

WIRELESS TELECOMMUNICATIONS BUREAU ANNOUNCES RELEASE OF ORDER REGARDING TREATMENT OF CONFIDENTIAL MATERIALS FILED IN CONNECTION WITH STATE PETITIONS FOR AUTHORITY TO REGULATE COMMERCIAL MOBILE RADIO SERVICE RATES

The Wireless Telecommunications Bureau on January 25, 1995 adopted an Order establishing procedures for treatment of materials associated with state petitions that seek to retain jurisdiction to regulate commercial mobile radio service rates. California has requested confidential treatment of these materials. Also, Hawaii and New York have offered to provide supplemental materials on a confidentiality basis. These procedures are expected to expedite the disposition of these proceedings, which pursuant to Section 332(c)(3)(B) of the Communications Act must be concluded within 12 months of the date that each petition was filed.

The Bureau adopted a model protective order that it will use to provide parties with access to confidential materials in PR Docket No. 94-105 (California), and in PR Docket Nos. 94-103 (Hawaii) and 94-108 (New York), if Hawaii and New York choose to make supplemental filings of confidential material. This protective order was crafted with input from parties after notice of the proposed provisions to all parties in this proceeding. The terms of this protective order will be adopted to govern treatment of confidential materials submitted by other states that seek to retain rate regulatory authority over commercial mobile radio service.

In addition, to govern confidential filings submitted by two Connecticut cellular carriers and the state of Connecticut, the Bureau adopted the terms of a protective order already in force in that state's proceeding.

Although the model protective order will permit limited disclosure of most of the information subject to the California request, certain data elements will not be disclosed because they are particularly competitively sensitive and not material to California's statutory demonstration. In certain other respects, the Order denies California's request for procedural reasons. If California wishes, it may re-file the defective portion of its request, with supporting materials that comply with Section 20.13 of the Commission's Rules, and a request for confidential treatment, no later than **January 30, 1995**. California is required to submit amended versions of its Petition and Appendices no later than **January 30, 1995**.

Neither Hawaii nor New York submitted confidential materials. If New York and Hawaii wish, they may submit the supplemental materials mentioned in their petitions, accompanied by a request for confidential treatment, in accordance with Sections 0.457, 0.459 and 0.461 of the Rules, no later than **January 30, 1995**. This quick turnaround is necessary if the Commission is to meet its statutory deadline. The Bureau expects to rule sufficiently promptly on any such submissions, and on the recently amended filing of confidential materials by the state of Connecticut, to maintain the schedule for comments and replies established today in its Order, and so expedite these proceedings.

California filed an emergency motion to compel production of data underlying the affidavits of Dr. Jerry Hausman that were filed in support of the Cellular Telecommunications Industry Association (CTIA) and AirTouch Communications (AirTouch) Oppositions to the California petition, and filed a motion to strike the Hausman affidavit attached to the CTIA Opposition, for failure to include the data underlying Hausman's analysis. The Bureau Order dismisses California's motions in this regard. It notes, however, that if AirTouch and CTIA wish the Commission to consider Hausman's analysis in its substantive review of California's petition, those carriers must provide the Commission with the underlying data used to conduct Hausman's analysis, accompanied by a request for confidential treatment if appropriate pursuant to Sections 0.457, 0.549 and 0.461 of the Commission's Rules, 47 C.F.R. §§ 0.457, 0.549 and 0.461, by **January 30, 1995**.

If counsel for parties in PR Docket Nos. 94-105, 94-103, 94-106, and 94-108 elect to inspect unredacted materials submitted by the States of California, Connecticut, Hawaii or New York, or by AirTouch or CTIA, such counsel shall execute and comply with the relevant protective order, and with the related provisions of the procedural Order. Parties shall file comments on those pleadings no later than **February 9, 1995**; reply comments shall be filed no later than **February 15, 1995**.

By the action of the Chief, Policy Division, Wireless Telecommunications Bureau. For further information, contact Julia Kogan, (202) 418-0630.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 94-105

In the Matter of

Petition of People of the State of California and the Public Utilities Commission of the State of California to Retain Regulatory Authority Over Intrastate Cellular Service Rates

ORDER

Adopted: January 30, 1995; Released: January 31, 1995

By the Chief, Wireless Telecommunications Bureau:

1. The People of the State of California and the Public Utilities Commission of the State of California (collectively, California) have filed an emergency motion for an extension of time from the January 27, 1995 deadline for filing revised versions of its petition and accompanying appendices, until Thursday, February 2, 1995.[1] For the reasons given below, we grant California the relief requested.[2]

2. Section 332(c)(3) of the Communications Act preempts state rate and entry regulation of commercial mobile radio services.[3] States exercising intrastate rate regulation may nevertheless petition the Commission to retain rate regulatory authority. California filed such a petition on August 9, 1994.

3. On January 25, 1995, the Wireless Telecommunications Bureau adopted and released an Order regarding treatment of requests for confidential treatment of information in the state petition proceedings, including a request by California that the Commission accord proprietary treatment to certain materials that it redacted from its publicly filed petition and appendices, and included in a separate version filed under seal with the Commission.[4] In that Order, the Bureau ordered California to file two new versions of its petition and appendices, one for public viewing and one for viewing under the terms of a protective order, in accordance with Bureau determinations of confidential status set forth in the Order.[5]

4. California orally notified Commission personnel of its intention to file the Motion, and submitted the Motion by facsimile January 26, 1995. The state asserts that as a practical matter, California cannot complete its revised filings to comply with the January 25 Order before Wednesday, February 1, 1995, for filing with the Commission, via overnight mail, on Thursday, February 2, 1995.[6] Specifically, the state states that it must conduct a line-by-line revision of Appendices G and H, as well as text accompanying those appendices, and must revise the fifty-page Appendix J and corresponding text, among other tasks.[7] California notes that it must then reproduce the revised filings, comprising hundreds of pages, and serve those new versions upon twenty-two parties.[8]

5. The required revisions are complex, and accuracy is important to avoid the potential for competitive harm to any of the parties whose information is involved. We recognize the burden of revising several hundred pages in an accurate fashion within several days, and the need to perform the revisions without error. Further, California, respecting the Commission's need to complete action rapidly in light of an impending statutory deadline, requested only a four day extension of time. For these reasons, we find that the Motion sets forth good cause for extension of the deadline, and we grant the requested four day extension of time, pursuant to delegated authority and Section 1.46(b) of the Commission's Rules, 47 C.F.R. § 1.46(b). Accordingly, California must make the filings specified in paragraph 44 of the January 25 Order prior to the close of the business day at the Commission on February 2, 1995.

6. Pursuant to Section 1.46 of the Commission's Rules, 47 C.F.R. § 1.46, we GRANT the Emergency Motion of the People of the State of California and the Public Utilities Commission of the State of California for an Extension of Time TO THE EXTENT INDICATED HEREIN. This Order is issued under delegated authority and, in order to meet the statutory deadline set forth in Section 332(c)(3)(B) of the Communications Act, 47 U.S.C. 332(c)(3)(B), is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Regina M. Keeney
Chief, Wireless Telecommunications Bureau

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[1] California, Emergency Motion for Extension of Time (dated Jan. 26, 1995, received Jan.30, 1995) (Motion).

[2] Comment and reply dates will be revised accordingly by a subsequent Bureau action.

[3] *See* Omnibus Budget Reconciliation Act of 1993 (Budget Act), Pub. L. No. 103-66, § 6002(c)(3), 107 Stat. 312, 394 (1993) (*codified at* Section 332(c)(3) of the Communications Act of 1934, 47 U.S.C. § 332(c)(3)).

[4] *See* Order, DA No. 95-111, adopted Jan. 25, 1995, released Jan. 25, 1995 ("January 25 Order").

[5] *See* January 25 Order at para. 44.

[6] *See* Motion, at 4.

[7] *Id.* at 4-5.

[8] *Id.* at 5.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: January 31, 1995

COMMERCIAL RADIO DIVISION, WIRELESS TELECOMMUNICATIONS BUREAU ANNOUNCES STREAM-LINING OF PROCEDURES FOR TRANSFER AND ASSIGNMENT APPLICATIONS

The Commercial Radio Division (CRD) of the Wireless Telecommunications Bureau announces new stream-lined procedures for transfer and assignment applications filed in the cellular, paging, and personal communications services through the establishment of a Transfer and Assignment Group in the Legal Branch of CRD. The Transfer and Assignment Group will include a public contact for all questions relating to the status of applications.

Starting on February 20, 1995, pro forma and non pro forma transfer and assignment applications will be handled on two different processing tracks. In the normal course, a pro forma transfer or assignment application will be processed within 30 days of the filing date; a non pro forma transfer or assignment application will be processed within 75 days of the filing date if no petitions regarding the application are filed. A Public Notice listing all transfer and assignment applications accepted for filing each week and all transfer and assignment applications that have been granted each week will be issued by the Legal Branch, CRD every Friday.

Commencing on February 20, 1995, questions concerning the status of pending applications should be directed to Betty Woolford, the CRD Customer Service Specialist. In addition, entities contemplating the filing of a large number of transfer or assignment applications are encouraged to contact Betty Woolford in advance of filing and provide the following information: type of filing (pro forma/non pro forma), number of call signs/facilities affected, number of applications, anticipated filing date, and anticipated closing date. This will help facilitate the processing of such applications by the Transfer and Assignment Group.

According to Regina Keeney, Chief of the Wireless Telecommunications Bureau, "CRD's processing initiative is in keeping with the Bureau's commitment to serve the public rapidly and efficiently. By revamping our transfer and assignment processing we will better serve our licensees' business needs. We will continue to make improvements to respond to the realities of doing business in this expanding commercial radio marketplace."

For further information, contact Betty Woolford at 202-418-0631.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

King Videocable Company — CUID No. CA0219
Los Angeles, California

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: January 31, 1995; Released: February 1, 1995

By the Chief, Cable Services Bureau:

INTRODUCTION

1. Here we consider complaints about the price King Videocable Company ("King") was charging for its cable programming service ("CPS") tier in Los Angeles, California, CUID No. CA0219.[1] King has attempted to justify its price through a benchmark showing on FCC Form 393. This order addresses the reasonableness of King's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[2]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[3] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[4] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[5] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[6]

3. The Commission's original rate regulations took effect on September 1, 1993.[7] The Commission subsequently revised its rate regulations effective May 15, 1994.[8] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[9] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[10] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[11]

PROCEDURAL MATTERS

4. The first valid CPS complaint was completed and served on King on November 4, 1993. The Commission received the complaint on November 9, 1993.

5. King attempted to justify its CPS price through an FCC Form 393 filed on December 6, 1993. King amended its justification on June 30, 1994 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally,[12] and on December 16, 1994 and December 20, 1994 in response to inquiries by the Commission.[13]

DISCUSSION

6. King asserts that its monthly CPS tier price of $7.37 per subscriber is justified by its benchmark filing because its price is equal to the maximum permitted charge of $7.37 as calculated in the filing. Upon review of King's Form 393, we have found no apparent errors that would require a recalculation of King's maximum permitted CPS price.

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[1] This order covers the franchise area including Tujunga, Sunland and Sylmar. The record is ambiguous whether this franchise area includes CUID No. CA0188 as well as CA0219. If CUID No. CA0188 is included in this franchise area, then it is included in this order.

[2] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent King has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) ("*Second Order on Reconsideration*"), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which King implemented its CPS price under the new regulations. See para. 3, *infra*.

[3] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[4] 47 C.F.R. § 76.956.

[5] 47 C.F.R. § 76.956(b).

[6] *Id.*

[7] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[8] *See Second Order on Reconsideration* at 4119; 47 C.F.R. § 76.922(b).

[9] *See Second Order on Reconsideration* at 4190, paras. 150-152.

[10] *Id.*

[11] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189, n.195.

[12] *Cable Operators' Rate Justification Filings*, DA 94-526 (released May 23, 1994).

[13] Facsimiles from Estella Salvatierra to John I. Davis, Esq., Wiley, Rein & Fielding (December 16 & 20, 1994).

CONCLUSIONS

7. Upon review of the record herein, we conclude that King has demonstrated that $7.37 per month (plus franchise fee) was the maximum reasonable CPS tier price for the period November 9, 1993 to May 14, 1994.[14]

8. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the November 4, 1993 complaint against the cable programming service price charged by King in Los Angeles, California, CUID No. CA0219, and all other complaints relating to the same price, ARE DENIED TO THE EXTENT INDICATED HEREIN.

9. IT IS FURTHER ORDERED, that the benchmark filing submitted by King with respect to Los Angeles, California, CUID No. CA0219, for the period of November 9, 1993 to May 14, 1994, justifies a maximum price of $7.37 per month (plus franchise fee) for King's cable programming service tier.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[14] This finding is based solely on the representations of King listed in paragraph 5, *supra*, and the modifications described in paragraph 6, *supra*. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Viacom Cable	CUID Nos. CA0407,
Napa, California, System	CA0408, CA1339

Benchmark Filings To Support
Cable Programming Service Prices

MEMORANDUM OPINION AND ORDER

Adopted: January 31, 1995; Released: February 1, 1995

By the Chief, Cable Services Bureau:

INTRODUCTION

1. Here we consider complaints about the prices Viacom Cable was charging for its cable programming service ("CPS") tier in the communities designated by the CUID numbers referenced above on its Napa, California, system. Viacom has chosen to attempt to justify its prices through benchmark showings on FCC Form 393. This order addresses the reasonableness of Viacom's prices only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994. Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

PROCEDURAL MATTERS

4. The first complete and timely CPS complaints in the franchise areas addressed in this Order were completed and served on Viacom and received by the Commission on the dates set forth in Appendix A.

5. Viacom filed its first FCC Form 393 for the City of Napa, California, CUID No. CA0407, on December 1, 1993 and filed an amended FCC Form 393 on December 2, 1993, in response to a notice from the City of Napa. Viacom filed its first FCC Forms 393 for Napa County, California, CUID No. CA0408, and the City of American Canyon, California, CUID No. CA1339, on December 8, 1993. Viacom filed amended FCC Forms 393 for each franchise area on June 27, 1994 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally.[11]

DISCUSSION

6. Viacom asserts that its monthly CPS tier prices are justified by its benchmark filings because its prices are lower than the maximum permitted charges as calculated in the filings. Upon review of Viacom's Form 393 filings, we have found that Viacom has not correctly calculated its maximum permitted prices, and it is therefore appropriate to make the following adjustments to Viacom's calculations in Form 393:

a. In its Form 393 filings, Viacom's calculations for its rate-regulated package as of the initial date of regulation (Form 393, Part II, Worksheet 1 and Form 393, Part I) count Channel 55 in the case of CUID Nos. CA0407 and CA0408 and Channel 27 in the case of CUID No. CA1339 as a satellite channel on the basic tier. However, according to the September 1, 1993 channel line-ups presented in Viacom's June 27, 1994 amendments, these channels carried Viewer's Choice, which is a pay-per-view service, for 17 hours a day and carried C-Span 2, which is a rate-regulated satellite service, for only 7 hours a day.

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Viacom has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration*, n.7 *infra*, the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Viacom implemented its CPS price under the new regulations. See para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) ("*Second Order on Reconsideration*"); 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration* at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189, n.195.

[11] *Cable Operators' Rate Justification Filings*, DA 94-526 (released May 23, 1994).

b. Our policy on "split" channels is to categorize them according to their preponderance of use. This policy is based on the fact that the 1992 price survey underlying the benchmark system was analyzed based on whole, not fractional, channel counts. Under the benchmark system in effect prior to May 15, 1994, all channels must be characterized as either rate-regulated or not subject to rate regulation and as either satellite or non-satellite. A "channel" is defined as a "unit of cable service identified and selected by a channel number or similar designation." FCC Form 393, p. 10. The preponderance-of-use test is the only one consistent with this conceptual framework.[12]

c. Under our rules, pay-per-view channels may not be counted as regulated channels or as satellite channels.[13] We therefore reduce the number of satellite channels used in calculating the benchmark on Form 393, Part II, Worksheet 1, Line 121 from 20 to 19 for CUID Nos. CA0407 and CA0408, and from 18 to 17 for CUID No. CA1339. We also reduce the number of total regulated channels on Form 393, Part II, Worksheet 1 from 34 to 33 for CUID Nos. CA0407 and CA0408, and from 31 to 30 for CUID No. CA1339. These adjustments have the net effect of increasing the benchmark channel rate entered on Line 121 of Worksheet 1.

d. In its amended filings of June 27, 1994, Viacom states that it calculated the Inflation Adjustment Factor (Form 393, Part II, Worksheet 1, Line 127, and Form 393, Part II, Worksheet 4, Line 401) using data it relied on when it set its CPS prices. If Viacom had done so correctly (i.e., if it had completed Form 393 with accurate data, including the most recent inflation data available as of the time it set its prices), and if based on this data Form 393 indicated that its prices were reasonable, then Viacom would have successfully justified its prices under paragraph 94 of the *Third Order on Reconsideration*.[14] However, the figures Viacom used are not consistent with data on which it should have relied in setting its CPS prices. Specifically, Viacom used data released by the U.S. Department of Commerce on August 31, 1993, to complete Lines 122 and 125, but used earlier data to calculate the Inflation Factor on Line 123. Furthermore, Viacom claimed an Adjustment Time Period extending through November 1993 (Line 124), which is inconsistent with an attempt to justify rates based on August 1993 data. Viacom's calculation of the Inflation Adjustment Factor is thus incorrect.

e. We must therefore recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date as of which Viacom filed.[15] On its amended Form 393s, Viacom entered 14 months on Line 124, indicating that these filings were as of the end of November 1993. On July 29, 1994, the Department of Commerce released corrected inflation data including Gross National Product Price Index (GNP-PI) figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through November 1993, the base date Viacom used in justifying its rates, of 1.032.

7. Correction of Viacom's errors does not result in a reduction in Viacom's maximum permitted CPS tier prices. We therefore conclude that Viacom has demonstrated that its prices for the CPS tier were not unreasonable.

CONCLUSIONS

8. Upon review of the record herein, we conclude that Viacom has demonstrated that its prices shown on Appendix B were just and reasonable for the period from the filing of the earliest complaint in each franchise area (as set forth in Appendix A) to May 14, 1994.[16]

9. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referred to in Appendix A against the cable programming service prices charged by Viacom Cable in the City of Napa, California, CUID No. CA0407; Napa County, California, CUID No. CA0408; and the City of American Canyon, California, CUID No. CA1339, and all other complaints relating to the same prices, ARE DENIED TO THE EXTENT INDICATED HEREIN.

10. IT IS FURTHER ORDERED, that the benchmark filings submitted by Viacom Cable with respect to the City of Napa, California, CUID No. CA0407; Napa County, California, CUID No. CA0408; and American Canyon, California, CUID No. CA1339, justify the price in each franchise area set forth in Appendix B (plus franchise fee) for Viacom Cable's cable programming service tier.

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[12] See Viacom Cable, Nashville, Tennessee, CUID No. TN0148, DA 94-1151, para. 6a-6c (released Nov. 9, 1994).

[13] *See General Instructions for Completing FCC Form 393*, Instruction No. 5 ("Cable programming service consists of all video programming distributed over a cable system that is not included in the basic service tier or offered on a per-channel or per-program basis"); *Instructions for Worksheet 1*, Line 121 ("For purposes of using the benchmark tables, a satellite-delivered signal' is any cable program service or superstation' delivered on a communications satellite that is not a premium service (pay channel or pay-per-view channel)").

[14] *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, FCC 94-40, 9 FCC Rcd 4316 (1994) (*"Third Order on Reconsideration"*) .

[15] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[16] This finding is based solely on the representations of Viacom listed in paragraph 5, and the modifications described in paragraph 6, *supra*. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Appendix A

CUID No.	Date First Complaint Filed with FCC	Date Complaint Served
0407	11/8/93	11/1/93
0408	11/15/93	11/8/93
1339	11/12/93	11/8/93

Appendix B

CUID No.	CPS Tier Price
0407	$9.31
0408	$9.27
1339	$9.44

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Viacom Cable CUID No. WA0258
Town of Eatonville, Washington

Request to Deny Jurisdiction

ORDER

Adopted: January 31, 1995; Released: February 1, 1995

By the Chief, Cable Services Bureau:

1. In this Order we dismiss a complaint against the price Viacom Cable was charging for its cable programming service (CPS) tier in the Town of Eatonville, Washington, CUID No. WA0258, on the ground that the complaint concerns rates that are outside the jurisdiction and authority of this Commission. As explained below, the Commission regulates rates for CPS only, and then only upon filing of a valid complaint. Our review reveals that the complaint filed against Viacom Cable in CUID No. WA0258, while asserting that it challenges CPS rates, challenges only rates for basic service, not for CPS. This complaint therefore does not trigger the Commission's jurisdiction, and it is accordingly dismissed.

2. The Cable Television Consumer Protection and Competition Act of 1992 (Cable Act of 1992)[1] distinguishes among basic cable service, premium cable service, and cable programming service;[2] this Commission regulates rates only for cable programming service. The basic service tier includes (at a minimum) the broadcast signals distributed by the cable operator along with any public, educational, and governmental (PEG) access channels that the local franchising authority requires the cable operator to carry. At the cable operator's discretion, this basic service tier may also include additional program services. Except in limited circumstances, the Commission does not have jurisdiction over rates for the basic service tier, and cannot act upon complaints concerning rates for that tier. Premium cable service consists of channels that are paid for individually (per-channel), such as Home Box Office (HBO) and CineMax. Channels for which the operator charges a per-channel or per-program rate are not subject to rate regulation. CPS includes all video programming distributed over the system that is not on the basic service tier and for which the operator does not charge on a per-channel or per-program basis. Rates for CPS tiers are subject to regulation by the Commission in response to a valid complaint.

3. The filing of a complaint regarding CPS rates that is not returned by the Commission establishes our jurisdiction, and triggers the operator's obligation to provide rate justification.[3] The complaint noted here was accepted for filing after preliminary review. Viacom Cable subsequently filed a response to the complaint stating that it concerns basic, not CPS, rates. Viacom Cable argues that challenges against rates for basic service should be submitted to the appropriate local franchising authority rather than to the Commission.

4. The complaint under consideration here was filed with this Commission on an FCC Form 329. FCC Form 329 is used by subscribers or local franchising authorities wishing to lodge with the Commission a complaint about an operator's CPS rates. The form is entitled "Cable Programming Service Rate Complaint." While it is designed for use in challenging upper tier rates, the form itself does not explain or define basic tier, premium, or cable programming services tier, but simply uses the term cable programming services' or CPS.' It is thus possible that a complainant might complete such a complaint form, and might check the box which states that "this complaint challenges the operator's CPS rates," without actually having distinguished or understood the difference between basic tier rates, premium service rates, and CPS tier rates.[4]

5. We have examined the complaint and Viacom Cable's response, and we conclude that the complaint challenges only basic rates, not CPS rates. Although the complainant has checked the box indicating that the rates challenged are CPS rates, and that these rates violate the Commission's rules,[5] the specific information provided by the complainant indicates that only basic rates are actually at issue. When only basic rates are being challenged, the complaint should properly be brought to the attention of the local franchising authority in the first instance, and not filed with this Commission. If the complaint does in fact challenge CPS rates, the complainant should file a petition for reconsideration providing information adequate to support his challenge.

6. Accordingly, IT IS ORDERED, pursuant to Section 623(a)(2)(A) and (B) of the Communications Act of 1934, as amended, 47 U.S.C. §543(a)(2)(A) and (B), that the complaint filed on November 8, 1993, against the cable programming service price charged by Viacom Cable in the Town of Eatonville, Washington, CUID No. WA0258, IS DISMISSED.

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[1] Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (Cable Act of 1992).

[2] Cable Act of 1992, Section 602, 47 U.S.C. §522.

[3] 47 C.F.R. § 76.956.

[4] We note that operators have great latitude in determining what channels will be included in the basic tier; once the statutory minimum (broadcast and PEG channels, as discussed above) is met, the operator may include as many additional channels in the basic tier as it wants, or it may move additional channels to a higher tier. Thus it is possible that a complainant might not clearly understand which channels are part of which tier.

[5] The form was changed in December 1993. *See* News Release of December 13, 1993. The change produced a simpler, clearer form, but even the new form does not provide definitions of or distinctions among the various service tiers. The specific assertion that the complainant is challenging CPS rates that violate the Commission's rules is question 13 on the original form; we note that this question has been eliminated on the new form. The complaint was filed on the original, pre-modification complaint form, and contains the certification that it challenges CPS rates.

7. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Viacom Cable East Bay, California, System and City of Dublin, California — CUID Nos. CA0353, CA0356, CA0360 CA0364, CA1115

Benchmark Filings To Support
Cable Programming Service Prices

Memorandum Opinion and Order

Adopted: January 31, 1995 **Released: February 1, 1995**

By the Chief, Cable Services Bureau:

INTRODUCTION

1. Here we consider complaints about the prices Viacom Cable was charging for its cable programming service ("CPS") tier in the communities designated by the CUID numbers referenced above on its East Bay, California, system and in Dublin, California. Viacom has chosen to attempt to justify its prices through benchmark showings on FCC Form 393. This order addresses the reasonableness of Viacom's prices only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

PROCEDURAL MATTERS

4. The first complete and timely CPS complaints in the franchise areas addressed in this Order were completed and served on Viacom and received by the Commission on the dates set forth in Appendix A.

5. Viacom filed its first FCC Form 393 for the City of Livermore, California, CUID No. CA0356; the City of Pleasanton, California, CUID No. CA0360; and the City of San Ramon, California, CUID No. CA1115, on November 26, 1993. Viacom filed its first FCC Form 393 for the City of Dublin, California, CUID No. CA0353, on December 13, 1993. Viacom filed its first FCC Form 393 for Alameda County, California-Sunol, CUID No. CA0364, on March 28, 1994. Viacom filed amended FCC Forms 393 for each franchise area on June 14 and June 27, 1994, in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally.[11]

DISCUSSION

6. Viacom asserts that its monthly CPS tier prices are justified by its benchmark filings because its prices are lower than the maximum permitted charge as calculated in the filings. Upon review of Viacom's Form 393 filings, we have found that Viacom has not correctly calculated its maximum permitted prices, and it is therefore appropriate to make the following adjustments to Viacom's calculations in Form 393:

a. In its Form 393 filings, Viacom's calculations for its rate-regulated package as of the initial date of regulation (Form 393, Part II, Worksheet 1 and Form 393, Part I) count Channels 0 and 27 as satellite channels on the basic tier. However, according to the September 1, 1993 channel line-ups presented in Viacom's June 27, 1994 amendments, Channel 0 carried Playboy TV, which is a premium service, for 10 hours a day and carried the California Channel,

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Viacom has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration*, n.7 *infra*, the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Viacom implemented its CPS prices under the new regulations. See para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) ("*Second Order on Reconsideration*"); 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration* at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189, n.195.

[11] *Cable Operators' Rate Justification Filings*, DA 94-526 (released May 23, 1994).

which is a rate-regulated service, for only 5 hours a day; and Channel 27 carried Viewer's Choice, which is a pay-per-view service, for 17 hours a day and carried C-Span 2, which is a rate-regulated satellite service, for only 7 hours a day. Further, Viacom's calculations for its rate-regulated package as of September 30, 1992 (Form 393, Part II, Worksheet 2) count Channel 0 as a satellite channel on the basic tier and Channel 22 as a satellite channel on the CPS tier. However, according to the November 1992 channel line-ups presented in Viacom's June 27, 1994 amendments, Channel 0 carried the Playboy Channel for 10 hours a day and it appears that it carried CNBC, which is a rate-regulated satellite service, for only 5 hours a day; and Channel 22 carried Sports Channel Pacific, which was a premium channel.

b. Our policy on "split" channels is to categorize them according to their preponderance of use. This policy is based on the fact that the 1992 price survey underlying the benchmark system was analyzed based on whole, not fractional, channel counts. Under the benchmark system in effect prior to May 15, 1994, all channels must be characterized as either rate-regulated or not subject to rate regulation and as either satellite or non-satellite. A "channel" is defined as a "unit of cable service identified and selected by a channel number or similar designation." FCC Form 393, p. 10. The preponderance-of-use test is the only one consistent with this conceptual framework.[12]

c. Under our rules, pay-per-view channels or premium channels offered on a per channel basis may not be counted as regulated channels or as satellite channels.[13] We therefore reduce the number of satellite channels used in calculating the benchmark on Form 393, Part II, Worksheet 1, Line 121 from 18 to 16. We reduce the number of total regulated channels on Form 393, Part II, Worksheet 1 from 34 to 32. We also reduce the number of satellite channels used in calculating the benchmark on Form 393, Part II, Worksheet 2, Line 220 from 18 to 16 and the number of total regulated channels on Worksheet 2 from 32 to 30. These adjustments have the net effect of increasing the benchmark channel rates entered on Line 121 of Worksheet 1 and Line 220 of Worksheet 2.

d. In its amended filings, Viacom states that it calculated the Inflation Adjustment Factor (Form 393, Part II, Worksheet 1, Line 127, and Form 393, Part II, Worksheet 4, Line 401) using data it relied on when it set its CPS prices. If Viacom had done so correctly (i.e., if it had completed Form 393 with accurate data, including the most recent inflation data available as of the time it set its price), and if based on this data Form 393 indicated that its price was reasonable, then Viacom would have successfully justified its price under paragraph 94 of the *Third Order on Reconsideration*.[14] However, the figures Viacom used are not consistent with data on which it should have relied in setting its CPS price. Specifically, Viacom used data released by the U.S. Department of Commerce on August 31, 1993, to complete Lines 122 and 125, but used earlier data to calculate the Inflation Factor on Line 123. Furthermore, Viacom claimed Adjustment Time Periods extending through October 1993, November 1993 and February 1994 (Line 124), which are inconsistent with an attempt to justify rates based on August 1993 data. Viacom's calculations of the Inflation Adjustment Factors are thus incorrect.

e. We must therefore recalculate the Inflation Adjustment Factors on the basis of the most accurate data currently available for the dates as of which Viacom filed.[15] On its amended Form 393s for CUID Nos. CA0356, CA0360 and CA1115, Viacom entered 13 months on Line 124, indicating that these filings were as of the end of October 1993. On its amended Form 393s for CUIDs CA0353 and CUID0364, Viacom entered 14 months and 17 months, respectively, indicating that these filings were as of the end of November 1993 and February 1994. On July 29, 1994, the Department of Commerce released corrected inflation data including Gross National Product Price Index (GNP-PI) figures of 122.3 for the third quarter of 1992, 125.7 for the third quarter of 1993, and 126.5 for the fourth quarter of 1993. Using these GNP-PI figures, we calculate Inflation Adjustment Factors through October 1993, November 1993, and February 1994, the base dates Viacom used in justifying its rates, of 1.030, 1.032, and 1.039, respectively.

7. Correction of Viacom's errors does not result in a reduction in Viacom's maximum permitted CPS tier prices. We therefore conclude that Viacom has demonstrated that its prices for the CPS tier were not unreasonable.

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[12] See Viacom Cable, Nashville, Tennessee, CUID No. TN0148, DA 94-1151, para. 6a-6c (released Nov. 9, 1994).

[13] *See General Instructions for Completing FCC Form 393*, Instruction No. 5 ("Cable programming service consists of all video programming distributed over a cable system that is not included in the basic service tier or offered on a per-channel or per-program basis"); *Instructions for Worksheet 1*, Line 121 ("For purposes of using the benchmark tables, a satellite-delivered signal' is any cable program service or superstation' delivered on a communications satellite that is not a premium service (pay channel or pay-per-view channel)").

[14] *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262 , FCC 94-40, 9 FCC Rcd 4316 (1994) (*"Third Order on Reconsideration")* .

[15] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

CONCLUSIONS

8. Upon review of the record herein, we conclude that Viacom has demonstrated that its monthly price for each franchise area set forth in Appendix B (plus franchise fee) was just and reasonable for the period from the filing of the earliest complaint in each franchise area (as set forth in Appendix A) to May 14, 1994.[16]

9. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referred to in Appendix A against the cable programming service price charged by Viacom Cable in the City of Dublin, California, CUID No. CA0353; the City of Livermore, California, CUID No. CA0356; the City of Pleasanton, California, CUID No. CA0360; Alameda County, California-Sunol, CUID No. CA0364; and the City of San Ramon, California, CUID No. CA1115, and all other complaints relating to the same prices, ARE DENIED TO THE EXTENT INDICATED HEREIN.

10. IT IS FURTHER ORDERED, that the benchmark filings submitted by Viacom Cable with respect to the City of Dublin, California, CUID No. CA0353; the City of Livermore, California, CUID No. CA0356; the City of Pleasanton, California, CUID No. CA0360; Alameda County, California, CUID No. CA0364; and the City of San Ramon, California, CUID No. CA1115, justify the monthly price for each franchise area set forth in Appendix B (plus franchise fee) for Viacom Cable's cable programming service tier.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Appendix A

CUID No.	Date First Complaint Filed with FCC	Date Complaint Served
0353	11/23/93	11/11/93
0356	11/16/93	10/27/93
0360	11/16/93	10/27/93
0364	2/24/94	2/25/94
1115	11/16/93	10/27/93

Appendix B

CUID No.	CPS Tier Price
0353	$10.23
0356	$10.23
0360	$10.23
0364	$10.23
1115	$10.14

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[16] This finding is based solely on the representations of [illegible] listed in paragraph 5, and the modifications described [illegible]raph 6, *supra*. Should information come to our attention [illegible]hese representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Viacom Cable CUID Nos. CA0351, CA0359, CA0365
Pittsburg, California, System

Benchmark Filings To Support
Cable Programming Service Price

Memorandum Opinion and Order

Adopted: January 31, 1995; Released: February 1, 1995

By the Chief, Cable Services Bureau:

INTRODUCTION

1. Here we consider complaints about the price Viacom Cable was charging for its cable programming service ("CPS") tier in the communities designated by the CUID numbers referenced above on its Pittsburg, California, system. Viacom has chosen to attempt to justify its price through benchmark showings on FCC Form 393. This order addresses the reasonableness of Viacom's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

PROCEDURAL MATTERS

4. The first complete and timely CPS complaints in the franchise areas addressed in this Order were completed and served on Viacom and received by the Commission on the dates set forth in Appendix A.

5. Viacom filed its first FCC Form 393 for the City of Antioch, California, CUID No. CA0351, on December 6, 1993 and filed an amended FCC Form 393 on February 2, 1994. Viacom filed its first FCC Form 393 for the City of Pittsburg, California, CUID No. CA0359, on December 8, 1993. Viacom filed its first FCC Form 393 for Bay Point, California, CUID No. CA0365, on December 13, 1993. Viacom subsequently filed amended FCC Forms 393 for each franchise area in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally.[11] These amended FCC Forms 393 were filed on June 14 and June 27, 1994 for the City of Antioch, California, CUID No. CA0351; on August 15, 1994 for Bay Point, California, CUID No. CA0365; and on September 2, 1994 for the City of Pittsburg, California, CUID No. CA0359.

DISCUSSION

6. Viacom asserts that its monthly CPS tier price of $9.54 per subscriber is justified by its benchmark filings because its price is equal to or lower than the maximum permitted charge as calculated in the filings. Upon review of Viacom's Form 393 filings, we have found that Viacom has not correctly calculated its maximum permitted price, and it is therefore appropriate to make the following adjustments to Viacom's calculations in Form 393:

a. In its Form 393 filings, Viacom's calculations for its rate-regulated package as of the initial date of regulation (Form 393, Part II, Worksheet 1 and Form 393, Part I) count Channels 27, 45, and 47 as satellite channels on the basic tier. However, according to the September 1, 1993 channel line-ups presented in Viacom's amendments, Channel 27 carried Viewer's

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Viacom has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration*, n.7 *infra*, the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Viacom implemented its CPS price under the new regulations. See para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) ("*Second Order on Reconsideration*"); 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration* at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189, n.195.

[11] *Cable Operators' Rate Justification Filings*, DA 94-526 (released May 23, 1994).

Choice, which is a pay-per-view service, for 17 hours a day and carried C-Span 2, which is a rate-regulated satellite service, for only 7 hours a day; Channel 45 carried Cable Video Store, which is a pay-per-view service, for 15 hours a day and carried Value Vision, which is a rate-regulated satellite service, for only 9 hours a day; and Channel 47 carried Hot Choice, which is a pay-per-view service, for 18 hours a day and carried the QVC Fashion Channel, which is a rate-regulated satellite service, for only 6 hours a day.

b. Our policy on "split" channels is to categorize them according to their preponderance of use. This policy is based on the fact that the 1992 price survey underlying the benchmark system was analyzed based on whole, not fractional, channel counts. Under the benchmark system in effect prior to May 15, 1994, all channels must be characterized as either rate-regulated or not subject to rate regulation and as either satellite or non-satellite. A "channel" is defined as a "unit of cable service identified and selected by a channel number or similar designation." FCC Form 393, p. 10. The preponderance-of-use test is the only one consistent with this conceptual framework.[12]

c. Under our rules, pay-per-view channels may not be counted as regulated channels or as satellite channels.[13] We therefore reduce the number of satellite channels used in calculating the benchmark on Form 393, Part II, Worksheet 1, Line 121 from 25 to 22. We also reduce the number of total regulated channels on Form 393, Part II, Worksheet 1 from 42 to 39. These adjustments have the net effect of increasing the benchmark channel rate entered on Line 121 of Worksheet 1.

d. In its amended filings, Viacom states that it calculated the Inflation Adjustment Factor (Form 393, Part II, Worksheet 1, Line 127, and Form 393, Part II, Worksheet 4, Line 401) using data it relied on when it set its CPS price. If Viacom had done so correctly (i.e., if it had completed Form 393 with accurate data, including the most recent inflation data available as of the time it set its price), and if based on this data Form 393 indicated that its price was reasonable, then Viacom would have successfully justified its price under paragraph 94 of the *Third Order on Reconsideration*.[14] However, the figures Viacom used are not consistent with data on which it should have relied in setting its CPS price. Specifically, Viacom used data released by the U.S. Department of Commerce on August 31, 1993, to complete Lines 122 and 125, but used earlier data to calculate the Inflation Factor on Line 123. Furthermore, Viacom claimed Adjustment Time Periods extending through November 1993, May 1994 and August 1994 (Line 124), which are inconsistent with an attempt to justify rates based on August 1993 data. Viacom's calculations of the Inflation Adjustment Factor are thus incorrect.

e. We must therefore recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available forthe date as of which Viacom filed.[15] On its Form 393 filing for CUID No. CA0351, Viacom entered 14 months on line 124, indicating that this filing was as of the end of November 1993. On its Form 393 filings for CUID Nos. CA0365 and CA0359, Viacom entered 20 months and 23 months, respectively, indicating that these filings were as of the end of May 1994 and August 1994. However, Viacom's use of the 20 months and the 23 months entries is impermissible. According to the service dates provided by Viacom, Viacom was required to file a justification of its CPS price for all of these CUIDs no later than December 13, 1993.[16] Since Viacom filed its initial FCC Form 393s by that date, the instructions to Form 393 required it to calculate the inflation adjustments only through November 1993.[17] Viacom cannot be permitted to claim an additional inflation adjustment simply because it filed amended Form 393s at later dates. On July 29, 1994, the Department of Commerce released corrected inflation data including Gross National Product Price Index (GNP-PI) figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through November 1993, the base date Viacom should have used in justifying its rates, of 1.032.

7. Correction of Viacom's errors does not result in a reduction in Viacom's maximum permitted CPS tier price of $9.54 per subscriber. We therefore conclude that Viacom has demonstrated that its price for the CPS tier was not unreasonable.

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[12] See Viacom Cable, Nashville, Tennessee, CUID No. TN0148, DA 94-1151, para. 6a-6c (released Nov. 9, 1994).

[13] *See General Instructions for Completing FCC Form 393*, Instruction No. 5 ("Cable programming service consists of all video programming distributed over a cable system that is not included in the basic service tier or offered on a per-channel or per-program basis"); *Instructions for Worksheet 1*, Line 121 ("For purposes of using the benchmark tables, a satellite-delivered signal' is any cable program service or superstation' delivered on a communications satellite that is not a premium service (pay channel or pay-per-view channel)").

[14] *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262 , FCC 94-40, 9 FCC Rcd 4316 (1994) (*"Third Order on Reconsideration"*) .

[15] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[16] 47 C.F.R. § 76.956(a) (operator must file a response within 30 days of the date of service of a complaint).

[17] FCC Form 393, page 11, instructions for line 124 (Inflation Adjustment Factor is calculated using "the number of whole months from September 30, 1992 to the date you will submit this form").

CONCLUSIONS

8. Upon review of the record herein, we conclude that Viacom has demonstrated that its monthly price of $9.54 per subscriber (plus franchise fee) was just and reasonable for the period from the filing of the earliest complaint in each franchise area (as set forth in Appendix A) to May 14, 1994.[18]

9. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referred to in Appendix A against the cable programming service price charged by Viacom Cable in the City of Antioch, California, CUID No. CA0351; the City of Pittsburg, California, CUID No. CA0359; and Bay Point, California, CUID No. CA0365, and all other complaints relating to the same price, ARE DENIED TO THE EXTENT INDICATED HEREIN.

10. IT IS FURTHER ORDERED, that the benchmark filings submitted by Viacom Cable with respect to the City of Antioch, California, CUID No. CA0351; the City of Pittsburg, California, CUID No. CA0408; and Bay Point, California, CUID No. CA0365, justify the monthly price of $9.54 per subscriber (plus franchise fee) for Viacom Cable's cable programming service tier.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Appendix A

CUID No.	Date First Complaint Filed with FCC	Date Complaint Served
0351	2/17/93	11/5/93
0359	12/20/93	11/8/93
0365	12/21/93	11/11/93

[18] This finding is based solely on the representations of Viacom listed in paragraph 5, and the modifications described in paragraph 6, *supra*. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

OKLAHOMA WESTERN TELEPHONE COMPANY — File No. W-P-C-6614

For Authority under Section 214 of the Communications Act to Operate a Cable Television Distribution System in Clayton, Oklahoma, and the Surrounding Rural Areas which are within the Applicant's Telephone Service Area

ORDER

Adopted: January 3, 1995; Released: February 1, 1995

By the Commission:

I. INTRODUCTION

1. Before the Commission is an Application filed by Cablevision of Texas III, L.P., (Cablevision) for Review of the *Memorandum Opinion and Order*[1] released by the Domestic Facilities Division, Common Carrier Bureau, authorizing Oklahoma Western Telephone Company (Western) to operate a Cable Television system in Clayton, Oklahoma and surrounding areas under the rural exemption to the cross ownership restrictions of 47 U.S.C. Section 533 and under Section 214 of the Communications Act (Act), 47 U.S.C. Section 214. For the reasons stated below, we deny the Application.

II. BACKGROUND

2. On June 28, 1990, Western, a telephone company in Oklahoma, filed an application under Section 214 of the Act seeking authorization to construct and operate a cable television system within its telephone service area. Cablevision opposed the application. On July 24, 1992, the Chief of the Domestic Facilities Division, Common Carrier Bureau, adopted an order finding that Western's proposed cable television service area was a rural area under 47 C.F.R. Section 63.58 and that Western had complied with the appropriate filing requirements, 47 C.F.R Section 63.09. Western was granted authorization to construct and operate the system.[2]

3. On September 4, 1992, Cablevision filed a Request for Stay and an Application for Review (Application). On September 9, 1992, Western filed a Motion for Extension of Time to respond to Cablevision's Request for Stay and, on September 21, 1992, an Opposition to the Request for Stay and an Opposition to the Application for Review. On November 25, 1992, Cablevision filed a Motion to Dismiss Western's already granted Section 214 Application (Motion). On December 4, 1992, Western filed an Opposition to Cablevision's Motion to Dismiss. On December 16, 1992, Cablevision filed a Reply to Opposition to Motion to Dismiss. On June 4, 1993, Cablevision filed a pleading entitled Emergency Appeal for Expedited Action on Request for Stay. This Order addresses the issues raised in the pleadings.[3]

III. CONTENTIONS AND DISCUSSION

4. *The Need for a Hearing.* In its Authorization, the Bureau examined Cablevision's numerous allegations of illicit conduct by Oklahoma Western and found they had been adequately answered and did not warrant a hearing.[4] In its Application, Cablevision argues that the Bureau erred in failing to designate these matters for hearing. Cablevision had alleged that Western was guilty of misrepresentation and lack of candor. Cablevision cites *TeleSTAR*,[5] a case decided under Title III of the Communications Act, as providing standards for determining the need for a hearing in this case. Cablevision argues that the "mandates" of Sections 319(a) and 214(a) of the Act are almost identical and that, therefore, the standards for designation of an issue for hearing in *TeleSTAR* should have been applied in the *MO&O* under Section 214.[6]

5. In reply, Western argues that the standards to be applied under Title III require not only specific allegations but substantial and material questions of fact and that the Bureau correctly determined that substantial and material questions of fact were not present.

6. We agree with the Bureau that the hearing requirements under Title III applicable to radio applications do not apply to Title II Section 214 applications.[7] While the Commission has the discretion to designate for evidentiary hearing issues raised in the context of a Section 214 application, we do not believe any such circumstances exist here. We agree that the Bureau correctly found that no substantial public interest questions here exist to justify a hearing and that, therefore, the Bureau's dismissal of the charges was appropriate. We decline, however, to affirm

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[1] *Memorandum Opinion and Order*, File No. W-P-C-6614, by the Chief, Domestic Facilities Division (Released August 5, 1992) (*MO&O* or Authorization).

[2] *Id.*

[3] For good cause shown, Western's Motion for Extension of Time is granted. In light of our decision here, Cablevision's Request for Stay of the Authorization is dismissed as moot.

[4] Authorization at para. 23.

[5] *TeleSTAR, Inc.*, 2 FCC Rcd. 5 (Rev. Bd. 1987); 2 FCC Rcd. 7352 (December, 1987); 3 FCC Rcd. 2860 (May, 1988); affirmed *TeleSTAR v. FCC*, 886 F.2d 442 (D.C. Cir. September, 1989).

[6] Title III of the Communications Act of 1934 governs use of the radio frequency spectrum. Section 319 applies to construction permits for radio station facilities. Title II governs interstate common carrier activities; Section 214 applies to construction, acquisition and extension of interstate lines by common carriers.

[7] *See ITT World Communications, Inc. v. FCC*, 595 F.2d 897, 900-01 (2d Cir. 1979) ("The lack of a hearing requirement in Section 214(a) contrasts sharply with Section 309(e)" (footnote omitted)).

the Bureau's use of the Commission's character policy in the broadcast area as appropriate for resolving similar questions in Section 214 applications proceedings.[8]

7. *Denial of Authorization as a Sanction.* Cablevision had alleged that Western engaged in premature construction and that divestiture was the appropriate sanction. In its Authorization, the Bureau found that, under *Eagle* [9] (a case in which a fully operational cable system was constructed prior to authorization and authorization was, nevertheless, granted), denial of Section 214 authority would be an inappropriate sanction for premature construction in the circumstances presented.[10] Cablevision argues that the Bureau erred in this finding. Cablevision asserts that *Eagle* is inapposite because denial and divestiture in that case might have disrupted existing cable service and inconvenienced the public. Western responds that *Eagle* was appropriately cited by the Bureau in support of its findings and asserts that precedent accords with the Bureau's refusal to deny 214 authorization as a sanction.

8. In *Eagle*, the determining factor for not requiring divesture of the cable system at issue was not that a community would lose its cable service but that divestiture was not necessary to achieve compliance with Section 214 of the Act nor required under Commission rules and precedent.[11] In that case, the Commission decided not to enforce its order of divestiture because the 1984 Cable Act had expressly grandfathered existing cross-ownership interests. In addition, the 1984 Cable Act was considerably more permissive than the Commission's rule toward telco ownership and operation of cable systems in rural areas.[12] Because such cross-ownership interests no longer were prohibited, divestiture was no longer necessary. Thus, *Eagle* is inapposite in this respect. *Eagle*, however, also stands for the proposition that disqualification of a carrier from receiving Commission authorization will not be required where, for example, compliance with the cable-telco cross-ownership rules can ultimately be achieved.[13] Based upon our decision in *Eagle* and the cases cited therein, we concur with the Bureau that withholding of Section 214 authorization to provide cable service in these rural areas is neither appropriate nor necessary.

9. *Qualification under the Rural Exemption.* In its Authorization, the Bureau certified that Western's proposed cable service area qualified as a rural area under 47 C.F.R. Section 63.58 of the Commission's rules.[14] Cablevision asserts that the 1990 Census *Summary of Population and Housing Characteristics* shows that the "North Pushmataha division" of Pushmataha County contains 2,788 persons, violating the requirement of Section 63.58 of the Commission's Rules that there be no "unincorporated place" within the cable system's proposed service area with a population of more than 2,500. Western replies that its service area does not include all of Pushmataha County and that the "North Pushmataha" division does not constitute an "unincorporated place" as the term is used in 47 C.F.R. Section 63.58.

10. As the Bureau noted in *Warren Telephone Co.*,[15] it is the specific label "CDP"[16] as applied to a locality in the 1990 Census Report that determines whether that locality qualifies as an "unincorporated place" under Section 63.58 of the Rules. The 1990 Census does not designate the "North Pushmataha division" as a "CDP."[17] Therefore, we agree with the Bureau that Oklahoma Western's proposed cable service area does not contain an "unincorporated place" with a population of more than 2,500 persons and that Oklahoma Western is, therefore, entitled to the rural exemption under 47 C.F.R. Section 63.58.

11. *Section 214 Authorization for MMDS Cable Construction.* Cablevision also claims that, in the Authorization, the Bureau mistakenly held that no Section 214 authorization is required for construction of the optical cable that feeds Western's multichannel multipoint distribution service (MMDS). Western denies that the Bureau held that Section 214 authority was not required for MMDS construction. Western claims the Bureau found only that this was an issue separate from Western's Section 214 application for construction of a cable system.

12. We find nothing in the Bureau's *MO&O* affirming or rejecting the need for Section 214 authorization for construction of the optical cable that feeds Western's MMDS. The Bureau simply determined that the issue of whether another Section 214 application might be required for separate construction of a distinct facility was irrelevant to Oklahoma Western's Section 214 cable application. We affirm this determination.

13. *Carrier/MMDS Cross Ownership.* In its Authorization, the Bureau found that the cable/telephone company cross-ownership restrictions do not apply to common carrier ownership of MMDS facilities.[18] Cablevision disputes this conclusion. Cablevision asserts that the restrictions bar Western from operating MMDS in its telephone service area. Western claims that Congress and the Commission intended not to include MMDS within the meaning of "video programming" as that term is used in the Cable Act of 1984 and in the Commission's Rules, and that the Commission's rules specifically provide for telephone company ownership of MMDS.

14. We have held that MMDS is exempt from the Act's cable-telephone company cross-ownership ban,[19] and thus we affirm the Bureau's conclusion to that effect based on the analysis set forth in our recent decisions.

15. *The Motion to Dismiss.* Finally, Cablevision argues that Western's Authorization is not final until the Application for Review is decided and asks that Western's Section 214 Application be dismissed on the grounds that Section

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[8] *MO&O* at para. 19, citing *Policy Regarding Character Qualifications in Broadcasting Licenses*, 102 FCC 2d 1179 (1986).
[9] *Eagle Telecommunications (Eagle)*, 59 RR 2d 1243 (1985).
[10] Authorization at para. 18.
[11] *Id.*
[12] *Eagle* at 1248.
[13] *Id.*
[14] Authorization at para. 22.
[15] 69 RR 2d 1343 (Common Car. Bur., 1991).
[16] "CDP" stands for "census designated place," a term used to describe the specific "urban" category formerly referred to by the Census as an "unincorporated place." *Warren Telephone Co.*, at 1345.
[17] Cablevision at Appendix 1.
[18] Authorization at para. 20.
[19] *Memorandum Opinion and Order In re Application of Excellence in Education Network*, 8 FCC Rcd 6269 (1993) at para. 8; *Memorandum Opinion and Order In re Application of Botetort County School Board*, 8 FCC Rcd 6265 (1993) at para. 8; *Memorandum Opinion and Order In re Application of School Board of Roanoke County*, 8 FCC Rcd 6273 (1993) at para. 8.

11 of the Cable Television Consumer Protection and Competition Act of 1992 (1992 Cable Act)[20] prohibits a cable operator from holding a license for an MMDS station within its service area. Cablevision asserts that, though Western's MMDS facilities were in existence before the effective date (October 5, 1992) of a provision in the 1992 Cable Act grandfathering preexisting cable/MMDS cross ownership, a federal court injunction prohibiting further construction of Western's cable system was also in operation on that date.[21] Cablevision argues that, because of the injunction, Western was prevented from construction and operation of a cable system and cannot be classified as a cable operator[22] at the time the provision went into effect, despite the Bureau's *MO&O* authorizing Western's cable service (effective July 24, 1992). Therefore, Cablevision argues, the 1992 Cable Act's grandfathering provision that might otherwise preserve Western's rights both as a cable operator and as an MMDS provider, does not apply. Cablevision claims that, to prevent illegal cross-ownership of an MMDS facility by a cable operator, the Commission must dismiss Western's Section 214 application.

16. Western asserts that Cablevision's Motion to Dismiss is procedurally defective. Western argues that, as of its effective date, the Bureau's *MO&O* is a final order under 47 C.F.R. Section 1.102(b)(1) and not a pending application subject to dismissal. Western further claims that, at the latest, it became a cable operator as of the effective date of the Authorization to provide cable service, more than two months before the effective date of the 1992 Cable Act's provision grandfathering its MMDS license. Western cites Section 7 of the 1992 Cable Act,[23] which uses the term "cable operator" to describe someone who is an applicant for a franchise to operate a cable system and, therefore, presumably, one who is not yet providing services over such a system. Westernreceived its cable franchise in 1989. Western argues that the description of a "cable operator" as someone "who provides services over a cable system" was not part of the 1992 Cable Act and was not intended to circumscribe the use of that term for purposes of the 1992 Cable Act.

17. We reject Cablevision's argument and observe that "section 613 of the Act directs the Commission to waive all cable/MMDS cross ownership interests ... existing as of October 5, 1992."[24] An entity has a cable ownership interest when it is "responsible for, through any arrangement, the management and operation of a cable system."[25] Western's July 24, 1992 Section 214 Authorization (a "final" grant, not a "pending" application)[26] was an arrangement by which Western became responsible for the management and operation of a cable system. Western, therefore, held existing cross-ownership interests on the date of its Section 214 Authorization.[27] As directed by Section 613 of the 1992 Cable Act, we waive the 1992 Act's cable/MMDS cross-ownership restrictions as applied to Western's cable/MMDS interests.

IV. CONCLUSION

18. For the reasons stated, we support the Bureau's findings and conclude that granting Section 214 Authorization to Western to provide a cable television service in Clayton, Oklahoma, and the surrounding areas would serve the public interest, convenience and necessity. In doing so, we also conclude that Western's operation of a cable television system does not violate the cross ownership restrictions of the Cable Television Consumer Protection and Competition Act of 1992, enacted since the Authorization was granted.

V. ORDERING CLAUSES

19. Pursuant to 47 U.S.C. Sections 154(i), 155 (c)(5), and 214, IT IS ORDERED that the Application for Review and the Motion to Dismiss filed by Cablevision of Texas III, L.P. ARE DENIED.

20. IT IS FURTHER ORDERED that the Motion to Stay filed by Cablevision is dismissed.

21. IT IS FURTHER ORDERED that the Motion for Extension of Time filed by Oklahoma Western Telephone Company IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[20] 47 U.S.C. Section 533 (a)(2) as amended.

[21] In *Cablevision of Texas v. Oklahoma Western Telephone*, 993 F.2d 208 (10th Cir. 1993) (*Cablevision v. Oklahoma Western*), the circuit court ordered the lifting of the injunction, declaring that the injunction should have been dissolved at the time the Commission granted Western its Section 214 Authorization and that the argument by which Cablevision had persuaded the district court to continue its injunction, i.e., that Western's Section 214 authorization was not "final," was false.

[22] "Cable operator" is defined in 47 U.S.C. Section 522 as one "(A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a system."

[23] 47 U.S.C §541.

[24] *In the Matter of Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992 (Erratum)*, MM Docket No. 92-264 (Released August 17, 1993).

[25] 47 U.S.C. §602(5); *see* note 22.

[26] 47 C.F.R. §1.104; *see also* note 21.

[27] We make no decision here with respect to Western's claim that it qualified as a cable operator upon receipt of its franchise under the Act.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

FOX TELEVISION STATIONS, INC. File No. BRCT-940201KZ

For Renewal of License for
Station WNYW-TV, New York,
New York

ORDER

Adopted: January 25, 1995; Released: January 25, 1995

By the Commission:

1. In this order we waive our rules to permit current and former Commission personnel to make statements to private parties concerning certain matters at issue in this proceeding. We also authorize release of certain internal agency documents.

2. This proceeding involves the application of Fox Television Stations, Inc. (FTS), for renewal of its license to operate Station WNYW-TV in New York City. The Metropolitan Council of NAACP Branches, *et al.*, has filed a petition to deny FTS' renewal application, which challenges FTS' qualifications for license renewal. To assist the Commission in resolving this matter, the Mass Media Bureau has undertaken an investigation of the circumstances surrounding FTS' 1985 applications to acquire six television stations. *See Interim Procedural Order*, File No. BRCT-940201KZ (Dec. 7, 1994); *Second Interim Procedural Order*, File No. BRCT-940201KZ (Dec. 21, 1994).

3. It is anticipated that current and former Commission personnel may be asked by private parties in this proceeding to be interviewed concerning the Commission's 1985 decision by providing relevant information gained in the course of their employment. Such information is not routinely made available to the public, and its disclosure to persons outside the Commission is prohibited by 47 C.F.R. § 19.735-206.[1] Thus, current and former Commission personnel are barred from providing such information.

4. We have decided to waive 47 C.F.R. § 19.735-206 and FCC INST 1113.4 to the extent they otherwise bar current and former Commission personnel from disclosing to the parties in this proceeding non-public information concerning the Commission's 1985 decision. In light of this order, former Commission personnel need not request approval pursuant to FCC INST 1113.4, Att. 1, to be interviewed concerning the 1985 decision by the private parties in this proceeding. *See Telestar, Inc.*, 4 FCC Rcd 4065 (1989). We have also decided to release certain internal documents to the private parties. These are the 1985 Agenda Item memorandum circulated to the Commission concerning the FTS application decision (the only existing internal agency record relating to the 1985 decision) and the statements provided to the Bureau made by current and former Commission personnel in the course of this investigation.

5. We wish to emphasize that these actions arise from the nature of the particular matters at issue in this proceeding. We also wish to emphasize that this order authorizes but does not compel anyone to be interviewed. Finally, by these actions, we do not waive any other privilege, right, or argument that may pertain to the Commission's 1985 decision or to any other Commission decision.

6. ACCORDINGLY, IT IS ORDERED, that 47 C.F.R. § 19.735-206 and other Commission requirements barring disclosure of non-public information ARE WAIVED to the extent indicated in paragraph 4, and the release of documents IS AUTHORIZED to the extent indicated in paragraph 4.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[1] The rule on its face refers only to current personnel. However, FCC Directive FCC INST 1113.4 also requires departing Commission personnel to execute a confidentiality pledge.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NYNEX Telephone Companies Transmittal No. 116

Revisions to Tariff F.C.C. No. 1

ORDER ON RECONSIDERATION

Adopted: December 29, 1994; Released: January 11, 1995

By the Commission:

I. INTRODUCTION

1. On September 2, 1992, the NYNEX Telephone Companies (NYNEX) filed Transmittal No. 116 to restructure application of its End User Common Line (EUCL) Multiline Business Subscriber rate for certain local exchange services. NYNEX proposed in Transmittal 116 to assess only one multiline business Subscriber Line Charge (SLC), per T1 facility,[1] so long as all the channels derived from that facility through network multiplexing equipment are used to provide one customer with either FLEXPATH Digital PBX Service (FLEXPATH Service), Analog to Digital Conversion PBX Service (Conversion PBX Service), or ISDN Primary Service (ISDN Service).[2] Previously, for FLEXPATH and Conversion PBX Services, NYNEX applied up to 24 Multiline Business Subscriber SLCs for these services, one for each derived channel used by the customer.[3] The Common Carrier Bureau rejected the tariff revisions made in Transmittal 116 on the ground that they violated Section 69.104 of the Commission's Rules, 47 C.F.R. § 69.104.[4]

2. In this *Order on Reconsideration*, we unambiguously affirm the Bureau's interpretation of the term "line" in Section 69.104 of the Commission's Rules for purposes of computing the "per line" SLC established therein. For the reasons described more fully below, a separate SLC should continue to be applied for each derived channel on a multichannel facility that is used by a customer as it has been in the past. Further, we conclude that in this case, NYNEX's tariff is contrary to the interpretation of Section 69.104 because it fails to assess one SLC per derived channel when one customer uses all the channels derived from a single T1 facility for the service NYNEX has specified. We find that NYNEX's attempt to limit the reach of this interpretation to instances in which multiple services are provided to a single customer over a single T1 finds no support in either the text of Section 69.104 or in NYNEX's previous tariff filing. We conclude that NYNEX's proposed application of the SLC established in Section 69.104 would result in the under-recovery of the subscriber line charges required under our access charge rules and is therefore contrary to the public interest in the consistent and principled application of our rules to existing and new services.

II. BACKGROUND

3. The Bureau, consistent with NYNEX's own previous practice, interpreted Section 69.104 to require that one SLC be assessed for each derived channel. In reaching this determination, the Bureau relied on the definition of "subscriber line" contained in Part 36 of the Commission's Rules, which defines a "subscriber line" as a "communication *channel* between a telephone station, PBX or TWX station and the central office which serves it" (emphasis added).[5] Part 36 further defines a "channel" as an "electrical path suitable for the transmission of communications between two or more points."[6] After observing that a channel derived from a T1 facility is an "electrical path suitable

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[1] Each T1 facility consists of a single transmission medium (*e.g*, twisted copper pair) from which the equivalent of up to 24 voice-grade channels can be derived through the use of multiplexing equipment. *See* In the Matter of NYNEX Telephone Companies, Revisions to Tariff F.C.C. No. 1, Transmittal No. 116, Memorandum Opinion and Order, 7 FCC Rcd 7938, 7938 n.1 (Com. Car. Bur. 1992) (*Rejection Order*).

[2] According to NYNEX, FLEXPATH Service allows a customer to directly integrate up to 24 trunk channels over a single 1.544 Mbps facility between a suitably equipped central office and a digital private branch exchange (PBX). Conversion PBX Service provides digital trunking capabilities via a 1.544 Mbps facility between a customer's digital PBX and an analog to digital interface device located at a central office switch. A maximum of 24 trunk access lines can be integrated into each 1.544 Mbps facility. Integrated Services Digital Network (ISDN) Service provides a direct digital connection, via switched access, to one or more public and/or private services. The service is used to connect ISDN compatible subscriber-provided premises equipment to a suitably equipped telephone company node. Twenty-four channels will be available at the ISDN port that terminates the circuit at the central office switch. The subscriber may choose to activate a subset or all of the channels at the port. *Rejection Order*, 7 FCC Rcd at 7938 n.3.

[3] Prior to the filing of Transmittal 116, Section 4 of NYNEX's Access Service Tariff F.C.C. No. 1 stated that the Multiline Business Subscriber SLC applies per line or trunk. Section 2 of NYNEX's tariff defined "line" as "a single electrical path between a telephone wire center and a point at the customer's premises" and "trunk" as "a single transmission path . . . connecting two switching systems in a network, used in the establishment of an end-to-end connection." Section 2 also defines "channel" as "an electrical or photonic, in the case of fiber optic-based transmission systems, communications path between two or more points of termination." NYNEX Transmittal 116, Description and Justification, at 2.

[4] *Rejection Order*, 7 FCC Rcd at 7938, 7939. Section 69.104 states:

> A charge that is expressed in dollars and cents *per line* per month shall be assessed upon end users that subscribe to local exchange telephone service, Centrex or semi-public coin telephone service to the extent they do not pay carrier common line charges. *Such charge shall be assessed for each line* between the premises of an end user and a Class 5 office that is or may be *used for local exchange service transmissions*. (Emphasis added.)

[5] 47 C.F.R. Part 36, Appendix-Glossary; *Rejection Order*, 7 FCC Rcd at 7938.

[6] *Id.*

for the transmission of communications," the Bureau concluded that NYNEX's previous reading of the rule was more reasonable than that newly advanced by NYNEX. That is, that one SLC must be assessed for each derived channel provided by NYNEX over its T1 facility. Thus, the Bureau concluded that NYNEX must continue to assess one SLC for each derived channel provided over its T1 facility.

4. The Bureau further observed that not only had NYNEX itself previously interpreted Section 69.104 in this manner, it continues to do so in cases where a single T1 facility is used to provide one customer with more than one type of local exchange service. Finally, the Bureau rejected NYNEX's argument that charging only one SLC per T1 facility is proper because those T1-derived channels cost less than if they were provided over multiple facilities. Under the current rules, the Bureau noted, the number of lines, rather than the cost of those lines, is the decisive factor for determining the number of SLCs to assess.[7] NYNEX was therefore ordered to file tariff revisions removing the rejected material and reinstating the currently effective material.[8]

5. On December 30, 1992, NYNEX and Bell Atlantic[9] filed petitions for reconsideration of the *Rejection Order* with the Common Carrier Bureau. On January 11, 1993, and January 14, 1993, respectively, Prodigy Services Company (Prodigy) and Southwestern Bell Telephone Company (SWBT) filed comments in support of the petitions for reconsideration. Reply comments in support of the petitions were filed by Ameritech Operating Companies[10] on January 25, 1993.[11] The Common Carrier Bureau has referred this matter to the Commission pursuant to 47 C.F.R. Section 1.106(a)(1). For reasons set forth below, we deny NYNEX's and Bell Atlantic's petitions.

III. SUMMARY OF PLEADINGS

6. NYNEX and Bell Atlantic argue that the Bureau has misinterpreted the Commission's rules regarding the application of SLC charges, and that the Bureau's interpretation, if sustained, will have an adverse impact on the deployment of new services such as ISDN.[12] Prodigy, in its comments, argues that the Bureau's requirement that SLCs be assessed on a per-channel basis for ISDN services could lead to the uneconomic, non-cost based pyramiding of these charges on services that promise to bring valuable new functionalities to the public. According to Prodigy, this is antithetical to the Commission's express policies to promote the availability of new technologies in the public interest.[13] Prodigy further argues that the application of more than one end user common line charge to a single local loop will over-recover the non-traffic sensitive costs properly assignable to that facility, and that it would be pure happenstance if there were any correlation between those charges and the cost of providing ISDN service.[14]

7. NYNEX and Bell Atlantic both argue that in determining whether a SLC applies per T1 facility or per derived channel, the Bureau's decision to rely on the Part 36 definition of "subscriber line" was incorrect. They argue that the Bureau should have relied upon the definition of "line" contained in Section 69.2(x) of the Commission's Rules, 47 C.F.R. § 69.2(x).[15]

8. Section 69.2(x) defines "line" as follows:

> *Line* or Trunk *includes*, but is not limited to, *transmission media* such as radio, satellite, wire, cable and fiber optic cable means of transmission. (Emphasis added.)

NYNEX and Bell Atlantic maintain that using this definition, the more reasonable reading of the Part 69 rules is that one SLC must be assessed for each transmission medium, such as a T1 facility, used by a LEC to provide a local exchange service. Bell Atlantic argues that under this definition, a multi-channel service like ISDN, that is provided over a single physical facility (a two-wire or four-wire subscriber loop) uses a single "line," and should therefore be assessed a single SLC.[16] NYNEX asserts that the Bureau erred in finding that NYNEX's definition of "line" as a "transmission medium" was unreasonable.[17]

9. Nonetheless, NYNEX recognizes that the rule is not entirely clear, and that, given the qualifying phrase "includes, but is not limited to," in Section 69.2(x), the definition of line may, in some instances, mean a derived channel rather than a facility. Indeed, NYNEX agrees with the Bureau's interpretation of the rules in situations where derived channels are used to provide several services to one or more customers, *i.e.*, when the derived channel comprises the entire local exchange service. In such instances, NYNEX states, the application of one SLC charge per derived channel used to provide an end user local exchange service is appropriate.[18]

10. NYNEX argues further that for purposes of assessing SLCs, it makes sense that, in certain instances, a line may consist of a derived channel, and in other instances, a line may consist of a physical facility, such as a twisted copper pair. With respect to "non T1" local exchange services such

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[7] *Rejection Order*, 7 FCC Rcd at 7939.

[8] *Id.*

[9] The Bell Atlantic telephone companies (Bell Atlantic) are The Bell Telephone Company of Pennsylvania, the four Chesapeake and Potomac telephone companies, The Diamond State Telephone Company, and New Jersey Bell Telephone Company.

[10] The Ameritech Operating Companies are: Illinois Bell Telephone Company, Indiana Bell Telephone, Incorporated, Michigan Bell Telephone Company, The Ohio Bell Telephone Company and Wisconsin Bell, Inc.

[11] The Electronic Frontier Foundation (EFF) filed an *Ex Parte* letter dated February 12, 1993 regarding NYNEX Transmittal 116. In that letter, EFF formally requests the Common Carrier Bureau to reconsider its order rejecting NYNEX's proposed tariff changes.

[12] NYNEX Petition at 3-5; Bell Atlantic Petition at 1. *Accord* Ameritech Reply at 1-2.

[13] Prodigy Comments at 2, *citing* Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), 104 FCC 2d 958 (1986) (*subsequent history omitted*). *Accord* Electronic Frontier Foundation, *Ex Parte* Letter Re: NYNEX Transmittal No. 116, Feb. 12, 1993.

[14] *Id.* at 3.

[15] *Accord* Electronic Frontier Foundation, *Ex Parte* Letter Re: NYNEX Transmittal No. 116, dated Feb. 12, 1993.

[16] Bell Atlantic Petition at 3.

[17] NYNEX Petition at 7.

[18] *Id.* at 7-8.

as residence or single line business service, the company notes, whether a LEC provides service using a derived channel or a physical facility is generally dependent upon network engineering factors. These factors include: (i) the availability of spare physical facilities in the area; (ii) the costs of refurbishing existing cable facilities; (iii) the costs of constructing new physical facilities; and (iv) the costs of installing derived channel (multiplexing) equipment. Clearly, reasons NYNEX, the application of SLC charges to end users should not vary depending upon how the LEC decides to engineer its network.[19]

11. Finally, NYNEX states that, given the advances in technology since the Commission adopted its Part 69 rules, it has become increasingly difficult to determine the proper application of SLC charges to the increasing variety of local exchange services. Yet, NYNEX maintains that until the rules are changed, the Part 69 definition of "line," not the Part 36 definition of "subscriber line" or "channel" should control the application of SLCs, and under that definition, its proposed application of SLCs in Transmittal 116 is reasonable.[20]

12. Bell Atlantic adds that under the Bureau's definition, local exchange carriers (LECs) would be required to charge three SLCs for basic rate ISDN service, and 24 on primary rate ISDN service. Bell Atlantic argues that this would create a dramatic mismatch between costs and revenues for ISDN and similar services, and create insuperable administrative obstacles to the implementation of new bandwidth-on-demand services. Bell Atlantic asserts that nothing in the rules indicates that the Part 36 definitions should apply to the Part 69 access charge rules, and argues further that the Part 36 definition of "subscriber line" actually contradicts the Part 69 definition of "line."[21]

13. Bell Atlantic further maintains that if the two Parts of the Commission's rules are to operate consistently, the Part 36 definition of "line" as "channel" cannot apply to the Part 69 SLC. This is so, according to the company, because Part 36 assigns Exchange Line Cable & Wire Facilities investment to subscriber or common line (subcategory 1.3) based on the number of working "loops" dedicated to that use.[22] According to Bell Atlantic, a "loop" in Part 36 is the physical facility -- "a pair of wires, or its equivalent"[23] -- not a measure of capacity like a channel. Bell Atlantic states that Part 36 then separates 25 percent of the subcategory 1.3 common line investment and assigns it to the interstate jurisdiction, where it is used to calculate the SLC revenue requirement for Part 69.[24] According to the company, that revenue requirement, which was derived from the number of physical "loops," is then divided by the number of Part 69 "lines" to determine the SLC.[25] Bell Atlantic concludes that unless Part 69 "lines" are defined on the same basis as Part 36 "loops" -- *i.e.*, the physical facilities connecting the subscriber to the central office -- the result will be a mismatch between the revenues collected by the SLC on multi-channel, single-facility services and the separated investment the SLC is designed to cover.[26] The Bureau's *Rejection Order*, according to Bell Atlantic, risks adding such substantial SLC charges to the price of ISDN and similar services that they may not ever reach the marketplace.[27]

14. Finally, Bell Atlantic asserts that the *Rejection Order's* interpretation of the rules will be impossible to administer when the "National ISDN 2" standard is implemented. According to the company, this bandwidth-on-demand standard will enable primary rate ISDN customers to reconfigure the channels of their ISDN facility in real time, without telephone company intermediation. Under these circumstances, a SLC count based on channels rather than physical facilities will become largely meaningless, and quite costly, if not impossible to administer.[28]

15. SWBT concurs with NYNEX and Bell Atlantic that the Bureau erred by relying on the Part 36 definition of subscriber line, instead of the Part 69 definition of line under which a single SLC would be assessed per "transmission medium," regardless of capacity. SWBT adds that the Commission has previously addressed the issue of charging SLCs on a per line basis as opposed to a relative use (number of channels) basis with regard to Centrex and PBX users.[29] SWBT maintains that in the *First Reconsideration Order* in the rulemaking docket establishing the Part 69 access rules, the Commission specifically rejected the application of SLCs based upon the relative usage of one line over another: "The suggestion that PBX users should pay more per line than Centrex-CO users because they get more usage from their lines appears to be a resurrection of the argument we rejected when we adopted the access charge plan."[30]

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19 *Id.* at 8-9.

20 *Id.* at 8-9.

21 Bell Atlantic Petition at 1, 3-4.

22 *Id.* at 3-4, *See also* Section 36.154(a) of the rules, 47 C.F.R. § 36.154(a).

23 *See* Part 36 of the rules, 47 C.F.R. Part 36, Appendix-Glossary.

24 *See* Sections 36.154(d), 69.304(a), 69.501(e) of the rules, 47 C.F.R. §§ 36.154(d), 69.304(a), 69.501(e). The remaining 75 percent becomes intrastate revenue requirement.

25 *See* Section 69.104 of the rules, 47 C.F.R. § 69.104.

26 Bell Atlantic Petition at 4-5.

27 *Id.* Bell Atlantic states that under the Bureau's interpretation of a line as a channel for purposes of Section 69.104, the customer cost of the ISDN loop for its planned primary rate ISDN service would increase by 65 percent per month, which would seriously reduce the services' viability in the marketplace. Alternatively, Bell Atlantic states that it could, at least "theoretically," absorb the extra SLC charges into the overall customer cost of the ISDN loop, but that would in turn require a reduction in the state tariff for the ISDN loop, and ultimately result in a dramatic mismatch between loop costs and loop revenues in the interstate and intrastate jurisdictions. By Bell Atlantic's calculations, while loop costs are 25 percent interstate, the interstate jurisdiction would be collecting two-thirds of loop revenues for ISDN loops. According to the carrier, this would cause underearning in state jurisdictions and generate pressure to increase intrastate rates as broadband services are introduced. On the interstate side, says Bell Atlantic, it would create overearnings that would increase Bell Atlantic's price cap sharing obligations for every broadband service it sold. Bell Atlantic reasons that both results would discourage LECs from introducing other broadband enhancements to the local exchange infrastructure. *Id.* at 5-6.

28 Bell Atlantic Petition at 6. *Accord* SWBT Comments at 3-4.

29 SWBT Comments at 2-3, *citing* In the Matter of MTS and WATS Market Structure, CC Docket No. 78-72, Phase I, 97 FCC2d 682, 700 (1983) (*First Reconsideration Order*).

30 *Id.* at 700 (para. 45).

IV. DISCUSSION

16. As is evident from the nature of the arguments presented, difficult policy questions are raised when existing rate structure rules must be applied to new services, such as ISDN and FLEXPATH PBX, which deliver service over network architectures that differ from those envisioned when the access charge rules were first adopted. Nonetheless, we are not persuaded by the petitioners that the Bureau's interpretation of the rules was in error, and therefore deny the petitions to reconsider the rejection of NYNEX's Transmittal 116. In assessing the lawfulness of Transmittal 116, the Bureau applied the prevailing interpretation of "line" under Part 69 which is reflected in NYNEX's current tariff and concluded that NYNEX's proposed tariff revision was inconsistent with Section 69.104's requirement that a SLC be assessed on a per-line, interpreted as "per channel" basis. The Commission's authority to reject a tariff on the ground that it is inconsistent with the Commission's interpretation of a term in its own rules, even in a case of first impression, was recently affirmed by the United States Court of Appeals for the D.C. Circuit in *Capital Network System, Inc. v. F.C.C.*, 28 F.3d 201 (D.C. Cir. 1994).[31]

17. The primary argument made by NYNEX and Bell Atlantic is that the Bureau erred by using the definition of subscriber line contained in Part 36 for purposes of counting the number of lines to be assessed subscriber line charges under Section 69.104(a), instead of the definition of line contained in Part 69 itself. Part 69 and Part 36 each contain definitions of "line" which have some bearing on the question of how to apply the "per-line" subscriber line charge at issue in this proceeding. The Part 69 definition of "Line" merely lists what transmission media or facilities are included, but not how to count them for purposes of per-line charges. The Part 36 definition of "Subscriber Line" essentially equates "line" with "channel."

18. The question raised by the petitioners is which definition to apply in reviewing NYNEX's transmittal. The Bureau relied upon the Part 36 definition for several reasons. First, as is evident from NYNEX's own tariff, this is the interpretation of "line" that NYNEX itself had utilized in the past to assess SLCs on a per-channel basis. Second, this definition provided a more comprehensive definition for line counting purposes than the Part 69 definition, which is mainly illustrative of types of transmission media which may constitute a line. The Part 36 definition provides an answer to the question of how to count lines for purposes of charging SLCs, both in cases where all of the channels derived from the T1 are used to provide a single customer with a single service and in cases where the channels are used to provide more than one service to one or more customers. The interpretation advanced in their pleadings by NYNEX and Bell Atlantic under Section 69.2(x) arguably supplies an answer to the former situation, but clearly fails to provide any guidance on the latter.

19. NYNEX itself acknowledges that when the derived channel comprises the entire local exchange service provided to the customer, then the application of one SLC per derived channel is appropriate. Yet under the Part 69 definition of line, no such distinctions are made. NYNEX's desire to charge SLCs on a per-service or per-channel basis when the derived channel comprises the entire local exchange service provided can only be accommodated under the express language of the Part 36 definition of line, which equates a line with a channel. Indeed, prior to filing Transmittal 116, NYNEX itself equated "line" with "channel" and charged customers one SLC per channel for its FLEXPATH and Conversion PBX services. As the Bureau noted in its *Rejection Order*, NYNEX's request to charge SLCs on a per T1 facility basis when all channels of a T1 are used to provide one switched local exchange service to one customer, but on a per channel basis when the channels are used to provide more than one service to one customer is not consistent with its own (and Bell Atlantic's) position that a T1 provided to one customer is a single line and thus should be charged one SLC.[32]

20. We therefore reject NYNEX's and Bell Atlantic's position that the Part 36 definitions should not apply to the Part 69 access charge rules. Use of this Part 36 definition for the purposes of computing charges under Part 69 is appropriate because it provides a more comprehensive definition of line for purposes of assessing per-line charges, is consistent with prior industry practice, as evidenced by NYNEX's own tariff and tariff application, and because Part 69 relies on Part 36 terminology to assign the interstate costs of LEC facilities, as "separated" by Part 36, to various access rate elements.

21. Bell Atlantic's other argument against using the Part 36 definition of subscriber line is equally unavailing. Assessment of subscriber line charges on a per-channel basis will not create a mismatch between interstate and intrastate loop revenues and costs, as Bell Atlantic claims. Subscriber line charges currently are based on average loop costs, not the cost of a particular type of loop. Thus, the subscriber line charges recovered from ISDN service need not be based on the costs of actual ISDN loops. Nor will Bell Atlantic's price cap sharing obligation increase if revenue from subscriber line charges for ISDN service increases. Subscriber line charges defray only part of the interstate cost of an average loop. An increase in revenue from subscriber line charges would not necessarily cause an increase in Bell Atlantic's price cap sharing obligations. Rather, such an increase would merely cause the related carrier common line charges, which recover the residual loop costs not covered by the subscriber line charge,' to decrease. Therefore, NYNEX will not be overrecovering loop costs on the interstate side if the Bureau's interpretation of line is allowed to stand. Furthermore, Bell Atlantic has not explained why, if its argument is correct, NYNEX,

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[31] The majority affirmed that the Commission's tariff rejection authority was sufficiently broad to encompass situations in which the Commission determines for the first time that a particular tariff practice violates the prohibition contained in Section 201(b) of the Communications Act of 1934 against unreasonable practices. *Capital Network System, Inc. v. F.C.C.*, 28 F.3d at 205; *see In the Matter of Capital Network Systems, Inc.*, 7 F.C.C. Rcd 8092 (1992). The majority also emphasized that the reviewing courts give even greater deference to agency interpretation of agency rules than they do to agency interpretations of ambiguous statutory terms. 28 F.3d at 206, *citing Udall v. Tallman*, 380 U.S. 1, 16 (1965).

[32] *See Rejection Order*, 7 FCC Rcd at 7939.

which was previously assessing SLCs on a per-channel basis, did not face the problem of overrecovery of interstate revenues.[33]

22. Bell Atlantic also fails to explain why, in the case of ISDN or similar services, a mismatch occurs under the Bureau's interpretation, but would not occur when a LEC uses, as many do now, a single facility to the customer's premises, which is multiplexed in order to create multiple individual loops. From a technical standpoint, the physical facility connecting the subscriber to the central office is the same, yet under Bell Atlantic's interpretation of the rules, the two services would receive different treatment.

23. NYNEX properly observes that application of SLCs under our rules should not vary depending upon how the LEC decides to configure its network. But this appears to be the very result of our adopting NYNEX's new interpretation of line. Under that interpretation, for example, the carrier's decision to provide multi-channel service through a single transmission facility by means of network multiplexing equipment would result in a single SLC being assessed for one type of service, whereas that carrier's decision to provide that same multi-channel service using multiple loop facilities would result in multiple SLC charges. In contrast, the Bureau's interpretation of "line" will result in the same number of SLCs being assessed for multi-channel service no matter how the LEC chooses to configure its network.

24. Nor do we agree with SWBT's interpretation of the Commission's prior actions to support its argument that physical lines rather than relative usage should be counted for purposes of assessing SLCs.[34] No service examined in the rulemaking docket establishing the Part 69 access charge rules involved the provision by the LECs of multi-channel service over a single physical facility. The Commission first addressed the question of how to count lines for purposes of charging SLCs when it considered party-line service.[35] In the case of party-lines, the Commission directed that each party must pay a SLC, despite the fact that only a single LEC facility was used to serve multiple customers. That is, the subscriber line charges should be identical for both single-party and multi-party subscribers, regardless of the network configuration.[36]

25. In the case of Centrex-CO and PBX, however, the Commission counted physical lines or loops for purposes of imposing SLCs. Each LEC-provided line used to connect a subscriber station to the central office for provision of Centrex-CO service would be assessed one SLC.[37] In the case of PBX service, the Commission required LECs to charge one SLC for each line or trunk connecting a central office with a PBX. In neither case, however, does the LEC's service consist of multiple channels derived from a single line.[38] Rather, the PBX, for example, consolidates the traffic from multiple channels within the customer's premises so that the PBX user can order fewer lines to handle its traffic. Although SWBT correctly notes the Commission's rejection of a usage-based system of assessing SLCs for PBX service, that is only one part of the relevant precedent. Taken together, the Commission's actions in the *Access Charge Order* and the relevant *Reconsideration Orders* indicate that the Commission has historically assumed the equivalency of a "line" and a "channel" in determining how to count lines for purposes of assessing "per line" charges under Part 69.[39] In any event, these decisions do not support the interpretation advanced by the LECs in this proceeding.[40]

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[33] Bell Atlantic's further argument regarding intrastate pricing decisions are beyond the scope of this proceeding.

[34] *See* SWBT Comments at 2-3.

[35] *See* MTS and WATS Market Structure, Third Report and Order, CC Docket No. 78-72, 93 FCC 2d 241, 349 (1983) (*Access Charge Order*), *modified on recon .*, 97 FCC 2d 682, 697-98 (1983) (*First Reconsideration Order*), *modified on further recon.*, 97 FCC 2d 834 (1984) (*Second Reconsideration Order*), *aff'd in principal part and remanded in part, Nat'l Ass'n of Regulatory Utility Comm'rs v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985),h)" *modified on further reconsideration*, 99 FCC 2d 807 (1984) (*Third Reconsideration Order - Part I*), 101 FCC 2d 1222 (1985) (*Third Reconsideration Order - Part II*), *aff'd on further reconsideration*, 102 FCC 2d 849 (1985) (*Fourth Reconsideration Order*).

[36] In the *Access Charge Order*, the Commission adopted a transition rule that treated each party line customer as a separate line for purposes of assessing SLCs, and a permanent rule which required a charge per party calculated by dividing a single SLC among the subscribers sharing each party line. On reconsideration, the permanent rule was amended to permit charges to be calculated on the basis of the average level of subscription or "fill" in each class of party-line service. Thus, a flat charge for each class of party-line service was to be computed by dividing the single-line rate by the fill for that class of service. *First Reconsideration Order*, 97 FCC 2d at 697-98. Those determinations were appealed, and were subsequently remanded for further consideration. *Nat'l Ass'n of Regulatory Utility Comm'rs v. FCC, supra*, 737 F.2d at 1127. On remand, the Commission found that the subscriber fill approach of our previous rule was seriously incongruent with the actual costs of providing party-line service, and that assessing the single-party charge on multi-party service would provide a much closer match between costs and charges. Accordingly, the Commission directed that the subscriber line charges should be identical for both single-party and multi-party subscribers. In the Matter of MTS and WATS Market Structure, CC Docket No. 78-72, Phase I, *Memorandum Opinion and Order*, 50 Fed. Reg. 9633 (paras. 5-6) March 3, 1985 (*Party-Line Remand Order*). The LECs' argument that SLCs be charged on a "per-facility" basis is similar to the Commission's initial permanent party-line rule dividing the single-line rate by the "fill," which was abandoned on remand in favor of a SLC per-party charge.

[37] *See First Reconsideration Order*, 97 FCC 2d at 698-701; *Second Reconsideration Order*, 97 FCC 2d at 843-52. In the case of Centrex-CO service, each of the Centrex customer's main stations are linked directly to the switch located at the central office by a subscriber loop. The switch meets both the customer's internal telecommunications needs and serves as the customer's interface with local and interexchange networks. In contrast, with a PBX system, the multiple Centrex-loop system is replaced by inside wiring terminating at the PBX, with the PBX linked by substantially fewer lines (or trunks) to the central office.

[38] The LEC may, of course, choose to provision multiple PBX or Centrex lines over a single facility as the LEC does for many exchange services.

[39] *See, e.g., First Reconsideration Order*, 97 FCC 2d at 698-701; *Second Reconsideration Order*, 97 FCC 2d at 843-52; *Party-Line Remand Order*, 50 Fed. Reg. 9633 (paras. 5-6).

[40] The remaining arguments advanced by the LECs and Prodigy concern the impact of the Bureau's interpretation on LEC ISDN prices, and the viability of the rules once the "National ISDN 2" standard is implemented permitting customers to reconfigure the channels of their ISDN facility in real time, without telephone company intermediation. We find that these are essentially arguments of policy in support of a rule change, not a rule interpretation.

26. The issues raised by NYNEX's proposed reinterpretation of our rules are complex and potentially impact other end user charges. To a large extent the comments filed in this proceeding raise policy issues which would best be addressed in the context of a rulemaking proceeding, not in the tariff review process. Resolution of these matters should await the full development of a factual record reflecting the views of all interested parties.

V. ORDERING CLAUSES

27. Accordingly, IT IS ORDERED that the petitions for reconsideration filed by the NYNEX Telephone Companies and the Bell Atlantic Telephone Companies are DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: February 2, 1995

BELL ATLANTIC PETITIONS FOR WAIVER OF PART 69 RATE STRUCTURE, FILES TARIFF INTRODUCING VIDEO DIALTONE MARKET TRIAL IN NORTHERN VIRGINIA

Comments/Petitions: February 13, 1995
Replies: February 21, 1995

On January 27, 1995, The Bell Atlantic Telephone Companies (Bell Atlantic) filed a Petition for Expedited Waiver of Part 69 of the Commission's Rules, 47 C.F.R. Part 69, to introduce a rate structure and tariff rate elements for video dialtone service in a limited market trial. According to its petition, Bell Atlantic seeks to waive the Commission's Rules only for the duration of a limited market trial of video dialtone services in the Northern Virginia area. Bell Atlantic asserts that its video dialtone service offering will provide network transport for the transmission of video programming and other services offered by video programming and information providers to end-user subscribers.

In its waiver request, Bell Atlantic seeks to waive Sections 69.110 and 69.112 of the Commission's Rules, 47 C.F.R. §§ 69.110 and 69.112, to establish the following video dialtone tariff rate structure and rate elements: (1) video dialtone access link charges, to be assessed to programmer-customers for an optional connection from their designated location to a Bell Atlantic video distribution office located in the same local access transport area; (2) pointcast service charges, imposed for programmer-customer access to end users; and (3) signalling point charges, an optional monthly charge that the programmer-customer may pay to receive additional signalling capacity. Bell Atlantic also requests a waiver of Section 69.305(b) of the Commission's Rules, 47 C.F.R. § 69.305(b), to allow it to assign the video dialtone investment included in Cable and Wire Facilities Category 2 directly to the appropriate rate element.

On January 27, 1995, Bell Atlantic also filed Transmittal No. 742, revising Bell Atlantic Tariff F.C.C. No. 10 to introduce its proposed video dialtone market trial in Northern Virginia in accordance with the terms of its waiver request. Transmittal 742 was filed on 45 days' notice and has a scheduled effective date of March 13, 1995. Petitions against the tariff must be filed with the Commission on or before February 13, 1995. Bell Atlantic's reply must be filed on or before February 21, 1995.

On February 2, 1995, the Commission released a public notice describing the streamlined procedures that the Common Carrier Bureau will use to review the waivers and tariffs pertaining to video dialtone market trials that are filed by local exchange carriers. In accordance with those procedures, interested parties should file their comments concerning Bell Atlantic's waiver request and their petition against Bell Atlantic Tariff Transmittal 742 no later than February 13, 1995. Likewise, replies to comments concerning either Bell Atlantic's waiver request or its tariff transmittal are to be filed no later than February 21, 1995. All parties should combine their comments and/or replies into a single document. However, their discussion of the Part 69 waiver request should be separated from their discussion of the tariff revisions.

Interested parties should file an original and four copies of all comments and reply comments with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. In addition, one copy of each pleading must be sent to the Commission's contractor for public service records duplication, ITS, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037, and one copy to the Chief, Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554. Copies of the proposed tariff revisions and waiver requests can be obtained from ITS at (202) 857-3800. Both the tariff proceeding and the waiver proceeding will be treated as non-restricted for purposes of the Commission's ex parte rules. *See* generally 47 C.F.R. §§ 1.1200-1.1216. For further information contact Wanda M. Harris, Tariff Division, Common Carrier Bureau, (202) 418-1530.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: February 2, 1995

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON BELL ATLANTIC'S AMENDMENT TO WAIVER PETITION OF PART 69 RULES TO OFFER VIDEO DIALTONE SERVICE

On November 29, 1994, Bell Atlantic Telephone Companies (Bell Atlantic) filed a petition seeking an expedited waiver of the Commission's rules in order to establish a new rate structure and tariff rate elements for video dialtone service under transport categories of Part 69. Bell Atlantic states that the waiver is necessary for it to file a tariff offering video dialtone service. Bell Atlantic proposes to establish recurring and non-recurring charges to be assessed to programmer-customers or end-user subscribers for video dialtone service components because a uniform rate structure is not currently prescribed for video dialtone service.

On January 27, 1995, Bell Atlantic filed an amendment to its initial petition for waiver. Bell Atlantic states that it is amending its petition to address concerns raised by parties regarding the interconnection charge that would permit a programmer to use transport from another provider. Specifically, Bell Atlantic plans to modify its proposed video dialtone access link recurring charges that explicitly facilitate connection with its video network. In its amendment, Bell Atlantic describes the three different interconnection points. Bell Atlantic also amends its petition so that only recurring charges for Broadcast and Narrowcast Service will be charged on a per potential end-user subscriber basis.

Interested parties should file comments on Bell Atlantic's petition by **February 16, 1995**, and reply comments by **February 27, 1995**, with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: ITS, Inc. 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Bell Atlantic's petition is available for inspection and copying in the Policy and Program Planning Division, Common Carrier Bureau, Room 544, 1919 M Street, N.W., Washington, D.C. 20554. Copies also can be obtained from ITS at (202) 857-3800.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally* 47 C.F.R. §§ 1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 418-1579.

FEDERAL COMMUNICATIONS COMMISSION

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: February 3, 1995

NYNEX PETITIONS FOR WAIVER OF SECTION 69.4 FOR NEW OPERATOR-ASSISTANCE SERVICES

Pleading Cycle Established

COMMENTS: February 21, 1995
REPLY COMMENTS: March 3, 1995

On December 8, 1994, the NYNEX Telephone Companies (NYNEX) filed a petition for waiver of Section 69.4(b) of the Commission's Rules, 47 C.F.R. §69.4(b), to permit the establishment of rate elements for a group of new operator call completion services.

NYNEX states that it proposes to offer various automated and operator-assisted call handling and billing functions to interexchange carriers (IXCs) for their use in completing and billing interLATA calls. It asserts that no interLATA transport will be provided in conjunction with the proposed services. NYNEX states that the grant of the waiver will advance the goals of the Commission's access charge regime by allowing NYNEX to establish new rate elements for the recovery of its costs from cost causers.

NYNEX states that it seeks Commisson approval to establish the following new rate elements: (1) automated call processing; and (2) operator assistance call processing. In addition, NYNEX proposes to apply the following three non-recurring charges to operator call completion services: (1) call branding; (2) access order charge; and (3) service modifications. NYNEX states that grant of the requested waiver will serve the public interest by expanding competitive options for IXCs currently engaged in the provision of operator services or contemplating the initiation of such services.

Interested parties may file comments on NYNEX's petition no later than February 21, 1995. Replies should be filed by March 3, 1995

An original and four copies of all comments and replies must be filed in accordance with Section 1.51(c) of the Commission's Rules, 47 C.F.R. § 1.51(c). In addition, one copy of each pleading must be filed with International Transcription Service (ITS), the Commission's duplicating contractor, at 2100 M Street, N.W., Suite 140, Washington, D.C. 20037, and with the Chief, Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554. Copies of the waiver request and any subsequent comments can be obtained from ITS at (202) 857-3800. The waiver proceeding will be treated as non-restricted for purposes of the Commission's ex parte rules. *See* generally 47 C.F.R. §§ 1.1200-1.1216. For further information contact Wanda M. Harris, Tariff Division, Common Carrier Bureau, (202) 418-1530.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Report No. DS-1492 **Released: February 6, 1995**

INTERNATIONAL BUREAU ELIMINATES REDUNDANT FILING OF RADIATION HAZARD STUDIES

1. Effective upon release of this Public Notice, earth station applicants and licensees will no longer be required to submit a Radiation Hazard Study for certain filings under Part 25 of the Rules. These new procedures will streamline licensing of earth station applications by eliminating redundant filings, while ensuring full compliance with antenna radiation standards. This reform stems from suggestions made in the course of roundtable discussions with the public about ways in which the Bureau can further streamline processing, eliminate unnecessary regulations, and better serve the public interest.

2. *Background.* Since January 1, 1986, all new earth station applications and applications for modification or renewal of an existing station license have been required to certify whether grant of the application will have a significant environmental impact. *See* 47 C.F.R. § 1.1307(b); and *Memorandum Opinion and Order,* 50 Fed. Reg. 38653 (1985). The applicant makes this initial determination by preparing a Radiation Hazard Study, in which the applicant assesses the radiofrequency (RF) radiation levels in the region around the antenna, and compares those findings to the American National Standards Institute (ANSI) recommended guidelines. *See Public Notice,* No. DS-1231 (released Sept. 29, 1992). If there are no potential hazards and no applicable limits are exceeded, the applicant certifies compliance on the application form. *See, e.g.,* FCC Form 493, "Application for Earth Station Authorization and for Modification of Station License," Question No. 25. Should the RF radiation levels exceed the ANSI guidelines, the applicant must file an Environmental Assessment (EA), including an exhibit explaining action as necessary to bring the proposal into compliance. *See Public Notice,* Report No. DS-1331 (released July 15, 1993).

3. *Streamlined Filing Requirements.* Applicants have routinely filed Radiation Hazard Studies as exhibits to all earth station filings: new applications, renewals, requests for modification, and assignment and transfer applications. Usually these exhibits are offered to support the ANSI guideline compliance certification or the EA documentation. The Commission evaluates this data for adverse environmental impact prior to grant of any earth station application. Once this documentation is on file, however, there is no longer a need for redundant filings of the same information. The filing of identical, subsequent Radiation Hazard Studies constitutes an unnecessary burden on applicants, and causes unwarranted delay in the processing of applications.

4. Accordingly, applicants are no longer required to file a Radiation Hazard Study in the following situations:

1) renewal applications for earth station antennas originally licensed after January 1, 1986;

2) requests for modifications to earth stations licensed after January 1, 1986 that *do not* involve: (a) an increase in EIRP or EIRP density; (b) an increase in transmitter power; (c) any change in coordinates for stations operating in C-band; (d) a change in coordinates of 10 seconds or greater for stations operating in Ku-band; or (e) any change or addition to antenna facilities.

5. Applicants are further reminded that Section 1.1307 does not apply to assignment or transfer applications. Therefore, Radiation Hazard Studies are not required for these applications.

6. This Public Notice does not alter an applicant's or licensee's responsibility for compliance with Section 1.1307. It simply eliminates submissions of Radiation Hazard Studies already on file at the Commission.

7. Interested persons with a suggestion that will improve the Bureau's ability to serve the public are urged to call or write Scott Blake Harris, Chief, International Bureau, Suite 800, 2000 M Street, N.W., Stop Code 0800, Washington, D.C. 20554, (202) 739-0422.

8. For further information regarding this notice, please contact Julie A. Garcia at (202) 739-0734.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 80-286

In the Matter of

Amendment of Part 36 of the
Commission's Rules and
Establishment of a Joint Board

ORDER

Adopted: January 30, 1995; Released: January 31, 1995

By the Deputy Chief, Common Carrier Bureau:

1. Beehive Telephone Co., Inc., and Beehive Telephone Inc., Nevada, (hereafter collectively referred to as "the Beehive companies") have requested a waiver from our recent Order that requires carriers to complete the Universal Service Fund Data Request.[1] As with other Commission requirements, we will grant a waiver of this order only if special circumstances warrant deviation from the general rule and such deviation serves the public interest.[2] For the reasons set forth below, we deny the Beehive companies' request for waiver.

2. The Beehive companies provide telephone service to approximately 600 customers residing in a 10,000 square mile area of Utah and Nevada. The Utah study area consists of 489 loops that have a cost of $1,123 each. The Beehive companies will receive $304,000, approximately $621 per loop, from the Universal Service Fund ("USF") in 1995.[3] The Nevada study area consists of 70 loops that have a cost of $771 per loop. The USF will provide $25,000, approximately $357 per loop, to the Beehive companies, for this service area in 1995.[4]

3. The Commission has structured the USF to promote affordable local telephone service by providing financial assistance to local exchange carriers ("LECs") that serve subscribers in areas for which local loop costs significantly exceed the national average cost of subscriber loops. The telecommunications industry, however, has changed significantly since the USF was first adopted, with carriers deploying new technologies and facing incipient competition for services for which previously there was none. We have required every carrier that provides "Telephone Exchange Service," as defined in Section 3(r) of the Communications Act of 1934, as amended,[5] to complete the Universal Service Fund Data Request. As we explained in our Data Order, the purpose of the data request is "to evaluate the current assistance mechanisms and to estimate the financial effects of possible rules changes on both telecommunications providers and subscribers."[6]

4. It is essential for us to gather data from every carrier so that we can properly evaluate the current assistance mechanisms. Moreover, without such data we cannot assess how various proposed changes to the structure of the USF would affect carriers. While we have requested data from the entire industry, we believe that data from carriers (such as the Beehive companies) that receive significant funding from the USF will be especially important to our analysis of the adequacy of the current USF rules and potential effects of changing them. The Beehive companies contend that this data request will impose an excessive burden on them because of the time and expense they allege it will take them to complete the request. This, however, does not demonstrate special circumstances that warrant deviation from our general requirement.[7] In particular, the companies have not distinguished themselves from other small LECs that must also complete the data request. As a result, we conclude that waiving for the Beehive companies our general requirement that local exchange carriers complete the Universal Service Fund Data Request will not serve the public interest.

5. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), and 155(c), and Sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91 and 0.291, that the petition filed by Beehive Telephone Co., Inc., and Beehive Telephone Inc., Nevada, requesting a waiver of the Data Order in this proceeding IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief, Common Carrier Bureau

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[1] Order, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, DA-94-1364 (released December 1, 1994) ("Data Order").

[2] Northeast Cellular Telephone Co. v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990); WAIT Radio v. FCC, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

[3] Universal Service Fund (USF) 1994 Submission of 1993 Study Results by the National Exchange Carrier Association, Inc. (September 30, 1994).

[4] *Id.*

[5] 47 U.S.C. §153(r).

[6] Data Order, supra, at para. 3.

[7] *Northeast Cellular Telephone Co.*, 897 F.2d at 1166; *WAIT Radio*, 418 F.2d at 1159.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Constellation Communications, Inc.	File Nos. 17-DSS-P-91(48) CSS-91-013 9-SAT-LA-95 10-SAT-AMEND-95

for Authority to Construct, Launch, and Operate a Low Earth Orbit Satellite System in the 1610-1626.5 MHz/2483.5-2500 MHz Band

ORDER

Adopted: January 31, 1995; Released: January 31, 1995

By the Chief, International Bureau:

I. INTRODUCTION

1. Constellation Communications, Inc. ("Constellation") has filed an application to construct, launch, and operate a low-Earth orbit ("LEO") mobile satellite system in the 1.6/2.4 GHz frequency bands ("Big LEO" service).[1] On November 16, 1994, Constellation amended its application in light of the rules and policies adopted by the Commission to govern "Big LEO" service.[2] By Public Notice, Report No. DS-1481 (November 21, 1994), we sought comment on Constellation's amended application. In response, Loral/Qualcomm Partnership, L.P. ("LQP"), Mobile Communications Holdings, Inc. ("MCHI"), TRW, Inc. ("TRW"), and Motorola Satellite Communications, Inc. ("Motorola"), each filed petitions to deny Constellation's application. AMSC Subsidiary Corporation ("AMSC") filed a "Petition to Defer Processing" of the Application, relief which Motorola also requests in the alternative.[3] Constellation filed a consolidated opposition, to which AMSC, TRW, and MCHI replied.

2. In this *Order*, we conclude that Constellation is not financially qualified at this time, and that further consideration of its application should therefore be deferred until January of 1996. We also reject the other applicants' assertions that changes in Constellation's ownership structure and feeder link request requireus to treat Constellation's application as newly filed and dismiss it rather than deferring consideration to January 1996.

3. Constellation is a Delaware Corporation. CTA Launch Services, Inc., owns 18.35% of its voting stock, and E-Systems, Inc., owns 30.7% of its voting stock. The remaining voting stock is owned by 29 entities or individuals, including Bell Atlantic, which holds an 8% interest.

4. Constellation proposes to construct a system consisting of 46 satellites. Eleven satellites would be deployed, in two launches, in circular equatorial orbit at an altitude of 2,000 kilometers. The remaining 35 operational satellites would be deployed, five per orbit, in seven circular orbits inclined 62 degrees and at an altitude of 2,000 kilometers. Each satellite would be designed with 32 spot beams, and a minimum capacity of more than 1,000 voice circuits per satellite, using Code Division Multiple Access ("CDMA") technology.

II. DISCUSSION

A. Constellation's Qualifications at This Time

5. *Financial Qualifications.* In the *Big LEO Order,* the Commission noted that the enormous costs involved in constructing and launching a satellite system have historically made it particularly important that applicants for satellite licenses to use spectrum which is in high demand demonstrate, in advance, the financial ability to proceed with construction of their systems. It noted its repeated experience that licensees without sufficient available resources spend a significant amount of time attempting to raise necessary funding, and that those attempts often end unsuccessfully.[4]

6. The Commission observed that, "where a grant to an under-financed applicant may preclude a fully capitalized applicant from implementing its plans, and service to the public may be consequently delayed," a "stringent financial showing" is warranted.[5] The Commission also observed that the Big LEO spectrum sharing plan it adopted did not accommodate all pending applicants, and left little or no room for expansion of existing systems or the development of future mobile satellite systems in the United States. For these reasons, the Commission determined that a strict financial requirement was warranted for the Big LEO service, and adopted a rule requiring that Big LEO applicants demonstrate committed internal or external financing sufficient to meet their systems' construction, launch, and first-year operating costs.[6]

7. Consequently, the financial qualification rules adopted for the Big LEO service require applicants for space stations to demonstrate that they, or their corporate parents, have current assets (cash, inventory, and accounts receivable) and operating income sufficient to cover the costs of construction and launch of the system's space segment, and of operating for one year following the launch of the first satellite. The Commission also requires that applicants submit evidence of a management commitment, from the

[1] Constellation first filed its application on June 3, 1991. AMSC Subsidiary Corporation, MCHI and Motorola filed petitions to deny. The Communications Satellite Corporation and TRW, Inc. filed comments. Constellation filed a responsive pleading. The matters raised in those petitions and comments have, except as addressed in this *Order,* been separately addressed through the adoption of service rules for Big LEO systems, or have otherwise been rendered moot through amendments to Constellation's application.

[2] *See In re Amendment of the Commission's Rules to Establish Rules and Policies Pertaining to a Mobile Satellite Service in the 1610-1626.5/2483.5-2500 MHz Frequency Bands,* 9 F.C.C. Rcd. 4936 (1994) (the "*Big LEO Order*").

[3] LQP, MCHI, TRW, Motorola, and AMSC all have competing Big LEO license applications pending before us.

[4] *Big LEO Order* at ¶ ¶ 26-30.

[5] *Big LEO Order* at ¶ 26.

[6] *Big LEO Order* at ¶ ¶ 30-32.

applicant or its parent corporation(s), as appropriate, to expend the necessary funds. Alternatively, applicants relying on external financing, such as bank loans, must demonstrate that such financing is "irrevocably committed," *i.e.*, that it has been approved and does not rest on contingencies which require action by either party to the transaction.[7]

8. Constellation estimates that its costs to build and launch the 46 satellites in its system, and to operate the system for one year after the launch of the first satellite, are approximately $1.721 billion. It relies on Bell Atlantic and E-Systems for financing. It submits a copy of Bell Atlantic's 1993 Annual Report, showing current assets of approximately $3.8 billion and operating income of approximately $2.8 billion. It also submits a copy of E-Systems' 1993 Annual Report, showing current assets of $750 million and operating income of $180 million.[8]

9. Constellation also submits evidence of Bell Atlantic's and E-Systems' "management commitments." With respect to Bell Atlantic, Constellation submits a letter from Brian Oliver, Bell Atlantic's Vice-President, Corporate Development, in which Mr. Oliver indicates that Bell Atlantic has completed an "initial review" of Constellation's application and business plan for satellite system construction and operation, and that it is Bell Atlantic's "intent to provide financial support for that satellite project . . . ." Mr. Oliver further states: "Actual [Bell Atlantic] financial commitments would be subject to negotiation of satisfactory agreements; and our customary internal business approval procedures, including, if applicable, approval by the Board of Directors." With respect to E-Systems, Constellation submits a letter from Peter A. Marino, E-Systems' Senior Vice President, indicating that E-Systems has reviewed Constellation's application and business plan for satellite system construction and operation, and intends to "provide the necessary financial support" for that satellite project.

10. The other Big LEO applicants argue that Constellation is not financially qualified. They argue that the "management commitments" on which Constellation relies fail to meet Commission standards, because, among other things, the Bell Atlantic letter appears to be contingent on further corporate review and approval by the Board of Directors. They also argue that, even if E-Systems' commitment is deemed sufficient, its resources are inadequate, by themselves, to meet projected costs.[9] TRW observes that, even if Bell Atlantic and E-Systems were to contribute to construction costs proportionally to their equity shares in Constellation, those contributions would leave Constellation with more than a $1 billion shortfall in funds. TRW also observes that no other Constellation shareholders have indicated their commitment to finance the venture.

11. Constellation, in response, argues that the letters it submitted were generally modeled on letters previously found acceptable by the Commission, and specifically on the letter found to establish financial qualifications in *National Exchange Satellite, Inc.*, 3 F.C.C. Rcd. 6992, 6993 n.5 (1988). Constellation also points to another case, *Contel ASC*, 3 F.C.C. Rcd. 6982 (1988), in which an applicant was found financially qualified. Constellation argues that the potential need for Bell Atlantic Board of Directors' approval does not vitiate Bell Atlantic's commitment. It argues that the Commission has expressly rejected Board of Directors' approval of management commitments as a necessary element of financial showings. It also argues that the reference to Board approval in the Bell Atlantic letter was merely meant to document Bell Atlantic's normal corporate approval process.

12. We agree that *National Exchange* sheds much light on this case, for a review of the management commitment in that case serves to accentuate the small but significant modifications made by Bell Atlantic here. The letter in *National Exchange* was from the Vice Chairman of Burlington Northern, Inc., a corporate parent of the applicant, and stated:

> The attached financial statements show Burlington Northern, Inc. (BNI) assets of $10.7 billion and stockholders' equity of $3.5 billion. In addition, BNI has credit lines of $1.35 billion. Annual funds from operations exceeded $1.2 billion for 1986. These available funds are well in excess of the $563.2 million required over six years for the National Exchange satellite program.
>
> BNI has reviewed National Exchange's FCC application and its business plans for satellite system construction and operation. BNI intends to provide the necessary financial support for that satellite project and other National Exchange projects subject to normal business reviews of market conditions and each project's progress to assure acceptable levels of risk and return.

[7] These requirements, and the documentation necessary to establish they have been met, are outlined in greater detail at 47 C.F.R. § 25.140(c) and (d). *See also* 47 C.F.R. § 25.143(b)(3); *Big LEO Order* at ¶ 35.

[8] Although it also submits information concerning the financial resources of Telecomunica'es Brasileiras S.A. ("TELEBRS"), and indicates that it has entered into a "strategic relationship" with TELEBRS, Constellation does not appear to be relying on that relationship to meet the Commission's financial qualifications requirements. Constellation indicates, for example, that TELEBRS is not yet an equity partner in its venture; it simply intends to make future equity investments. In any event, the TELEBRS documentation is insufficient to demonstrate Constellation's financial qualifications, in that, among other things, the agreements do not appear to be fully negotiated. *See* 47 C.F.R. § 25.140(d)(2).

[9] Several applicants also note that any Bell Atlantic commitment to Constellation implicates the line-of-business restrictions of the *Modified Final Judgment* ("*MFJ*"), a consent decree to which Bell Atlantic is a party. *See American Telephone and Telegraph Co.*, 552 F. Supp. 131, 227 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983). In light of our conclusion that Bell Atlantic's financial commitment does not meet Commission standards on other grounds, we need not address whether the potential need for Bell Atlantic to seek or obtain a waiver of the *MFJ* represents the type of contingency that renders its commitment insufficient to demonstrate Constellation's financial qualifications.

13. The Bell Atlantic letter differs from the *National Exchange* letter in several material respects.[10] First, the Bell Atlantic letter indicates that only "an initial review" of Constellation's application and business plan has been completed. On its face, this indicates that Bell Atlantic's commitment is far from "irrevocable" and is more preliminary than in *National Exchange*, where the corporate parent had completed its review of the application and business plan. Second, Bell Atlantic pledges "to provide financial support" -- in an unspecified amount -- whereas the parent in *National Exchange* set forth the anticipated cost of the system and pledged "to provide *the necessary* financial support" (emphasis added). Third, Bell Atlantic appends a *caveat* not included in the *National Exchange* letter: "Actual . . . financial commitments would be subject to negotiation of satisfactory agreements." This language makes sense only if the letter itself is *not* an "[a]ctual financial commitment[]," and it introduces the type of contingency -- successful completion of further negotiations and the completion of further agreements -- that evidences a financing commitment in only an early stage of development. Finally, the Bell Atlantic letter is explicitly conditioned on Board of Directors approval, "if applicable." The *National Exchange* letter included no similar conditions, and in fact was submitted by the Vice Chairman of the parent's Board of Directors.[11]

14. Constellation correctly argues that there is no "magic language" to demonstrate financial qualifications. The problem, however, is not that the Bell Atlantic letter failed to reproduce the *National Exchange* letter verbatim. The problem is that Bell Atlantic clearly *started* with the *National Exchange* language but modified it in ways that, without exception, introduce contingencies or limitations into language that had contained none. While the *Big LEO Order* "does not require an unalterable commitment that funds will be expended regardless of market conditions," it does require a commitment "that *absent a material change in circumstances*, [management] is prepared to expend the necessary funds."[12] Bell Atlantic's departures from the language in the *National Exchange* letter indicate that Bell Atlantic's corporate approval process has not proceeded to this point. Having found it necessary to add words of equivocation, neither Bell Atlantic nor Constellation can reasonably complain if we take them seriously.

15. The tentativeness of Bell Atlantic's commitment is particularly significant given Bell Atlantic's relatively small equity interest in Constellation. The parent corporation in *National Exchange* owned a majority of stock in the applicant (60%) and could, therefore, be more readily expected to commit funds unconditionally, given its ability to control the subsequent expenditures of those funds by the subsidiary. Bell Atlantic and Constellation do not have the same commonality of interest.[13]

16. In light of the fact that we find the Bell Atlantic letter inadequate under the standards embodied in our rules and the 1988 *National Exchange* case, we conclude that, even assuming that E-Systems' commitment letter meets Commission standards, its financial resources are by themselves insufficient to meet Constellation's estimated costs. Furthermore, the E-Systems letter does not indicate the extent to which E-Systems, which does not have a controlling interest in Constellation, is prepared to expend its internal funds or to use its company's assets as a vehicle for raising financing to support Constellation's system.[14] Accordingly, Constellation has not demonstrated that it is financially qualified at this time.

B. Further Processing Status of Constellation's Application

17. Several of the parties opposing Constellation's application urge us to dismiss the application if we find Constellation is not financially qualified. We will not do this. In the *Big LEO Order*, we afforded applicants until January 31, 1996, to demonstrate financial qualifications. We cannot find that because Constellation has submitted an inadequate showing at this time, it should lose its status in this processing group. Neither the text of the *Big LEO Order* nor the rules adopted in it indicate any such intent, and we would expect the Commission to provide explicit notice of such a policy. Indeed, to hold otherwise would unfairly penalize applicants who, in good faith, file a system application we later find does not conform with our

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[10] The letter states, in pertinent part, that Bell Atlantic Corporation (BAC):

> has completed an initial review of [Constellation's] FCC application and its business plans for satellite system construction and operation. It is BAC's intent to provide financial support for that satellite project subject to normal business reviews of market conditions and the project's progress to assure acceptable levels of risk and return.
>
> Actual BAC financial commitments would be subject to negotiation of satisfactory agreements; and our customary internal business approval procedures, including, if applicable, approval by the Board of Directors.

[11] *Compare National Exchange, Inc.*, 103 F.C.C.2d 836 (1985)(debt and equity financing subject to approval by the investor's Board does not meet Commission requirements). Such approval is analogous to the types of contingencies, such as approval by a bank's lending committee, that we have not accepted from domestic fixed-satellite applicants, who are subject to virtually the same financial standard as Big LEO applicants. Although Constellation correctly observes that we have not included Board of Director's approval as a mandatory portion of financial qualifications showings involving parent corporations, we think it reasonable that when management makes such approval an express condition of its company's commitment, that approval becomes a pre-condition of financing, rendering the commitment insufficient under our rules. Stated more bluntly, we cannot decline to question whether the statements of a corporate officer are adequate to commit the corporation, when those statements themselves raise the question.

[12] *Big LEO Order* at ¶ 35 (emphasis added).

[13] The other case relied on by Constellation, *Contel ASC*, involved a "commitment letter" with respect to a wholly owned subsidiary. The rules applicable in that case did not expressly require the submission of a "commitment letter" for commitments to a wholly owned subsidiary. *See Licensing Space Stations in the Domestic-Fixed Satellite Service*, 50 Fed. Reg. 36071 (Sept. 5, 1985). In this case, the Commission specifically required that Big LEO applicants, including wholly owned subsidiaries, submit evidence of a management commitment. *See* 47 C.F.R. § 25.143(b)(3). Furthermore, the Commission's ruling in *Contel ASC* does not reference the letter, nor in any way indicate that the commitment letter was a matter of decisional significance. Therefore, we do not believe the letter submitted in the *Contel ASC* case has any precedential value in this case.

[14] Unlike the corporate parent in *National Exchange*, E-Systems apparently does not view the word "necessary" as including the entire system's cost, given the inadequacy of its financial resources to meet those costs.

rules. Therefore, consistent with the Commission's stated goal in adopting the deferral mechanism -- to provide applicants with an opportunity to finalize financial arrangements over the next year -- we will defer action on Constellation's application.

18. *Ownership Changes and Waiver of Cut-Off Rule.* In June of 1991, when Constellation filed its original application, it reported that Microsat Launch Systems, Inc. ("Microsat") owned 39% of its voting stock, and Defense Systems, Inc. ("DSI") owned 10.1%. Pacific Communication Science, Inc. ("PCSI") owned a voting interest of less than ten percent, and a number of additional individuals and corporations held Constellation stock. In its November 16, 1994 amendment and subsequent pleadings, Constellation reports that a number of changes have occurred in its ownership structure since its application was filed. Constellation specifically notes that CTA, Inc., which was not a party to its original application, acquired DSI in June 1992; that Cirrus Logic, Inc. acquired PCSI in March 1993; and that CTA purchased Microsat in September 1993. Constellation also reports that in March 1993 and October 1994, respectively, E-Systems, Inc. and Bell Atlantic acquired new Constellation voting stock representing 31% and 8%, respectively, of Constellation's currently outstanding voting stock.

19. The cumulative result of these transactions is that more than 50% of Constellation's voting stock is now controlled by entities who were not owners of Constellation at the time it filed its application. However, Constellation argues that because the transactions occurred over a substantial period of time, and no one transaction represented a transfer of a controlling interest in Constellation, the changes do not constitute a transfer of control of the applicant. Constellation states that the CTA acquisitions of DSI and Microsat, and the Cirrus Logic acquisition of PCSI, were not motivated by a desire to obtain an interest in Constellation, but by a desire to acquire other lines of business. It also states that the sales of stock to E-Systems and Bell Atlantic were designed to bolster its finances.

20. The other Big LEO applicants argue that the changes in Constellation's ownership structure are so substantial as to require treating the application as newly filed and, therefore, no longer eligible for consideration in this processing group. They contend that the changes represent a fundamental change in the character of the applicant, a change reflected in both stock ownership and Constellation's Board of Directors. Several applicants argue that Constellation lacked candor or violated Section 1.65 of the Commission's Rules, 47 C.F.R. § 1.65 by not earlier reporting the transactions.

21. We recognize that some of the changes in Constellation's ownership may be "major amendments" under Section 25.116 of the Commission's Rules, 47 C.F.R. § 25.116, jeopardizing Constellation's eligibility for consideration in the current processing group. However, our overriding concern in determining whether a "major amendment" to the applicant's ownership structure has occurred is whether the applicant has attempted to profit from the sale of an application.[15] Unless there is evidence of this, we see no reason to prevent applicants from procuring partners to help finance the enormous cost of these systems. Regardless of whether there has been a transfer of control here, we find no intent to traffick in applications. Consequently, even if a "major" change in Constellation's ownership has occurred, we find these ownership changes to be in the public interest pursuant to Section 25.116(c)(2), and we will not treat Constellation's application as newly filed. [16]

22. We next address the allegations that Constellation should have disclosed these ownership changes earlier, and that its failure to do so evidences a disqualifying lack of candor or a violation of Section 1.65 of the Commission's rules. Even assuming that Constellation's course of conduct constitutes a technical violation of Section 1.65 of the Rules, its uncontradicted statements indicate that its actions did not result from intent to deceive or mislead the Commission. Accordingly, any violations are not disqualifying. We would note, however, that to the extent Constellation or its parents contemplate concluding future transactions which would have the cumulative effect of changing ownership or control of more than 50% of Constellation's stock, it is expected to seek a ruling concerning our cut-off rules prior to consummating those transactions.[17]

23. *Feeder Links.* Constellation originally requested feeder links in the 5150-5216 and 6525-6541.5 MHz bands. On November 16, Constellation amended its application, requesting feeder links at 5050-5250 MHz (Earth-to-space) and 6825-7025 (space-to-Earth). Motorola argues that Constellation's amended request for feeder link frequencies constitutes a major amendment under Section 25.116 of our Rules.[18] It claims that the amendment was not necessitated by the new policies and rules established in the *Big LEO Order*, and that it increases the potential for interference without resolving any frequency conflicts. Motorola also claims the amended request will decrease the likelihood that there will be enough spectrum available for all the qualified applicants in their desired feeder link bands, and that such requests will further delay unconditional licenses to Motorola and other system operators. Constellation replies that the feeder link spectrum amendment is a

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[15] In this regard, the Big LEO service differs from services in which multiple or cross- ownership rules may require closer review of ownership changes. Furthermore, the Big LEO applicants have each proposed to operate as private carriers. Thus, concerns about ownership changes that may violate Section 310(b) of the Communications Act are considerably diminished.

[16] We note in this regard that the changes in Constellation's ownership structure resulted in large part from the acquisition of its parents, DSI, PCSI, and Microsat. In the past, we have routinely authorized changes in control based on acquisition of a corporate parent with substantial lines of business apart from the applicant's proposed business. *STARSYS Global Positioning, Inc.*, 8 F.C.C. Rcd. 1662 (Comm. Car. Bur. 1993); *Airsignal International, Inc.*, 81 F.C.C.2d 472 (1980). Furthermore, the Bell Atlantic and E-Systems stock acquisitions are similar to those authorized in *Satellite CD Radio, Inc.*, 9 F.C.C. Rcd. 2569 (Comm. Car. Bur. 1994).

[17] It is not our intent, however, to require a prior ruling as a result of the normal churn of stock in publicly traded corporations. *See* Sewell, "Assignments and Transfers of Control of FCC Authorizations Under Section 310(d) of the Communications Act of 1934," 43 Fed. Comm. L.J. 277, 311-312 (1991) (Gradual, long-term changes in ownership of publicly traded corporations, due to multiple small share, *i.e.*, less than 1%, transactions, do not give rise to a transfer of control).

[18] 47 C.F.R. § 25.116.

necessary consequence of the Commission's policies requiring global coverage and spectrum sharing among CDMA systems.

24. In the *Big LEO Order*, the Commission afforded applicants the opportunity to amend their applications to bring them into conformance with newly adopted requirements and policies for satellite systems. It noted, for example, that a change from a geostationary satellite system configuration to a LEO configuration to meet our satellite system design requirement, or a change in coverage patterns to conform with our satellite visibility requirements, would not affect a particular application's status in the processing group. It also indicated, however, that "a change that is not necessary to bring the application into conformance with our rules *and* which would increase frequency conflicts, would render the application newly filed under Section 25.116 of the Rules.[19] As an example, it stated that a design change from a CDMA to a TDMA/FDMA system, which would not facilitate spectrum sharing, would be a major amendment. Such applications would be considered in a future processing group, after those applications deferred for consideration until January 1996.

25. Constellation redesigned its system to facilitate the spectrum sharing plan adopted in the *Big LEO Order* by increasing the number of end users that can be served simultaneously. It appears that Constellation's feeder link requests were a consequence of this redesign. Therefore, we do not believe the changes in Constellation's feeder link proposal should be considered major. Furthermore, even if the amendment were considered major within the meaning of Section 25.116 of the Rules, we would waive that rule in this case because (a) the modified system serves the public interest by increasing system capacity and spectrum-use-efficiency in the service links; (b) feeder link spectrum is for a use ancillary to the use of Big LEO spectrum; (c) the service is at a relatively early stage of development in which its spectrum requirements are still being addressed; and (d) any third parties who might be adversely affected by feeder link allocations will have a full opportunity to address potential interference concerns in other pending proceedings[20] or, in the event Constellation ultimately establishes its financial qualifications, in connection with any further amendments to or modifications of Constellation's feeder- link proposal. Accordingly, we decline to treat Constellation's application as newly filed.

III. CONCLUSION AND ORDERING CLAUSE

26. For the reasons stated, we cannot find at this time that Constellation is financially qualified to construct, launch, and operate the Big LEO system it proposes. In light of this conclusion, we need not address Constellation's technical qualifications and we express no opinion on that issue. We reject, however, the parties' arguments that Constellation has forfeited its right to further consideration with the second portion of this processing group. Constellation will therefore have until January 1996 to firm up its financial qualifications, in accordance with the *Big LEO Order*.[21]

27. Accordingly, IT IS ORDERED, that application file Nos. 17-DSS-P-91(48); CSS-91-013; 9-SAT-LA-95; 10-SAT-AMEND-95, ARE DEFERRED, subject to Constellation Communications, Inc., submitting a showing demonstrating its financial qualifications no later than January 31, 1996.

FEDERAL COMMUNICATIONS COMMISSION

Scott Blake Harris
Chief, International Bureau

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[19] *Big LEO Order* at ¶ 59 (Emphasis added).

[20] We note that the Commission has a number of issues related to the allocations of spectrum for Big LEO feeder links separately before it in several pending proceedings, including the *28 GHz Proceeding*, (Second Notice of Proposed Rule Making in CC Docket No. 92-297), 9 F.C.C. Rcd. 1394 (1994), and *Preparation for the World Radio Conference*, (Notice of Inquiry in IC Docket No. 94-31), 9 F.C.C. Rcd. 2430 (1994).

[21] *Big LEO Order* at ¶ ¶ 40-41.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

TRW Inc.

for Authority	File Nos. 20-DSS-P-91(12)
to Construct, Launch, and	CSS-91-015
Operate a Low Earth	17-SAT-LA-95
Orbit Satellite System	18-SAT-AMEND-95
in the 1610-1626.5	
MHz/2483.5-2500 MHz Band	

ORDER AND AUTHORIZATION

Adopted: January 31, 1995; Released: January 31, 1995

By Chief, International Bureau:

I. INTRODUCTION

1. TRW Inc. ("TRW") has filed an application[1] to construct, launch, and operate a low-Earth orbit ("LEO") mobile satellite system in the 1.6/2.4 GHz frequency bands ("Big LEO" service).[2] On November 16, 1994, TRW amended its application in light of the rules and policies adopted by the Commission to govern the "Big LEO" service. By Public Notice, Report No. DS-1481 (November 21, 1994), we sought comment on TRW's amended application. Mobile Communications Holdings, Inc. ("MCHI") filed a Consolidated Petition to Deny and a Consolidated Reply, Hughes Communications Galaxy, Inc. ("HCG") filed Consolidated Comments and a Reply, and Constellation Communications, Inc. filed Consolidated Comments. For reasons discussed below, we grant TRW's application, as amended, subject to certain conditions.

2. TRW proposes to construct a satellite system known as "Odyssey," consisting of twelve satellites. The satellites will be deployed, four per orbit, in three circular orbits at an altitude of approximately 5,600 nautical miles. Two additional satellites will be maintained as ground spares. TRW expects the system will include two fixed gateway stations in the United States. The Odyssey system is expected to provide mobile voice and data satellite services and radiodetermination satellite services. TRW anticipates the services will be used by cellular telephone service providers; emergency service providers; businesses tracking their products through a distribution system; and owners and operators of aircraft using the position-determination technique.

II. DISCUSSION

Financial Qualifications.

3. An applicant in the Big LEO service must demonstrate that it can meet the estimated costs of constructing all proposed satellites, launching them, and operating its system for one year after the launch of the first satellite.[3] If an applicant relies on current assets or operating income to demonstrate its financial qualifications, the applicant must submit evidence of a management commitment to fund the system.[4]

4. In accordance with Sections 25.140(c), (d)(1) and (d)(3) of our rules, TRW provided: (1) cost estimates for launch, construction, and the first year of operation of the satellite system; (2) financial statements; and (3) a declaration by its Chief Financial Officer expressing management's commitment to construct, launch, and operate the Odyssey system.[5] TRW's current assets and operating income are reported to be $1,994 million and $359 million respectively.[6] The estimated cost of construction, launch, and first-year operation of the Odyssey system is $1,844 million.[7]

5. Mobile Communications Holding, Inc. ("MCHI") alleges that TRW has failed to provide the Commission with information sufficient to demonstrate its compliance with our financial requirements. Specifically, MCHI claims that TRW cannot rely on its current assets and operating revenues because it intends to fund its system primarily from external sources rather than internal assets or income.[8] MCHI submits that, based on TRW's stated intent to seek external financing, it cannot reasonably claim at the same time to rely on internal funding.[9] MCHI also argues that TRW's reliance on internal assets, despite its intent to seek outside sources of funding, calls its candor into question.

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[1] TRW first filed its application May 31, 1991. American Mobile Satellite Corporation, Ellipsat Corporation, and Motorola Satellite Communications, Inc. filed petitions to deny. ARJAY, Inc., Communications Satellite Corporation, and Constellation Communications, Inc., filed comments. TRW filed a responsive pleading. Thereafter, 3S Navigation and Litton Systems, Inc. filed comments, and Motorola Satellite Communications, Inc. and ARINC filed reply comments. The matters raised in these petitions and comments have, except as addressed in this Order, been separately addressed through the adoption of service rules for Big LEO systems, or have otherwise been rendered moot through amendments to TRW's application.

[2] TRW requests authority to construct a mobile satellite system capable of operating in the 1610-1626.5/2483.5-2500 MHz frequency bands and to operate the system in the United States in the 1610-1621.35/2483.5-2500 MHz frequency bands. *See* TRW, Amendment to Application for Authority to Construct Mobile Satellite Service above 1 GHz Satellite System (Nov. 16, 1994) at 4 ("TRW Amendment to Application").

[3] 47 C.F.R. § 25.143(b)(3); 47 C.F.R. § 25.140(c) and (d).

[4] 47 C.F.R. § 25.143(b)(3).

[5] TRW Amendment to Application at Attachment B.

[6] *Id.* at Attachment B at 3.

[7] *Id.* at Attachment B at Appendix 1.

[8] MCHI, Consolidated Petition to Deny (Dec. 22, 1994) at 13) ("MCHI Consolidated Petition to Deny").

[9] *Id.* at Exhibit 8 (TRW press release dated November 15, 1994, announcing that TRW would fund 15 percent of the Odyssey system through joint venture with Teleglobe, Inc. and would fund the remaining 85 percent through vendor and debtor financing); *see also id.* at 31 (MCHI alleges that TRW's lack of commitment to fund the Odyssey system is demonstrated by TRW's failure to disclose, in its 1994 SEC filings, that it would use internal funds to construct, launch, and operate the Odyssey system).

6. In the recent *Big LEO Order*,[10] the Commission stated that "[t]he availability of internal funds sufficient to cover a system's costs provides adequate assurance at the time the Commission acts on the application, that the system can be built and launched. Current assets . . . provide a general measure of a company's ability to finance the project itself *or to raise funds from lenders and equity investors on the basis of its on-going operations*."[11] TRW has submitted substantial evidence to show that it has current assets and operating income sufficient to construct and launch its system, and provided an unequivocal statement that it intends to spend the funds necessary to construct the proposed system. The Commission's rules and policies do not require more. We have also reviewed the alleged inconsistencies between TRW's statements to the Commission and its statements in its press release and have considered MCHI's allegation of TRW's failure to disclose in its SEC filings that it would use internal funds to construct, launch, and operate Odyssey. We conclude that the statements and the alleged omission raise no substantial, material question of fact concerning TRW's candor or financial qualifications.

Technical Qualifications.

7. Applicants seeking authority to construct, launch, and operate Big LEO systems also must meet certain technical requirements. These requirements include: (1) using a non-geostationary satellite system design; (2) providing mobile satellite service to all locations as far north as 70^0 latitude and as far south as 55^0 latitude for at least 75 percent of every 24-hour period; (3) providing continuous service throughout the fifty states, Puerto Rico, and the U.S. Virgin Islands; and (4) preventing unacceptable interference to other authorized users of the spectrum.[12]

8. TRW has satisfied the system design and coverage requirements. Upon completion, the Odyssey system will consist of twelve satellites travelling in three non-geostationary satellite orbits. At least one Odyssey satellite will be visible at all times in the fifty states, Puerto Rico, and the U.S. Virgin Islands.[13] In accordance with Section 25.143(b)(2) of the Commission's rules, the Odyssey system will provide service to other areas between 70^0 North and 55^0 South latitudes at least 75 percent of the time.[14]

9. TRW's compliance with our rules on interference to other users requires more extensive discussion, however. Under Section 25.213(a) of the Commission's rules, TRW must protect the radio astronomy service ("RAS") in the 1610.6-1613.8 MHz band against harmful or unacceptable interference from Odyssey's Earth-to-space transmissions. Our rules require mobile earth stations operating within a fixed radius from RAS sites to terminate service during radio astronomy observation periods, unless the mobile-satellite service ("MSS") licensee otherwise agrees with the Electromagnetic Spectrum Management Unit ("ESMU") of the National Science Foundation. TRW proposes to comply with these rules by using beacon-actuated protection zones in lieu of fixed-radius protection zones where it has reached a coordination agreement with ESMU. In the absence of an agreement, TRW says it "will implement precision position determination techniques *or* completely shut down service in the relevant frequency bands . . . during periods of observation that have been duly notified to TRW."[15]

10. We are uncertain whether TRW proposes to use the "shut down" method in conjunction with or in lieu of precision position determination techniques. TRW's use of the "shut down" method in conjunction with position determination techniques would comply with our rules. However, the "shut down" method alone would not.[16] Nonetheless, it is clear that TRW's proposed use of either thebeacon-actuated protection zones where it has reached an agreement with ESMU, or the position determination technique satisfies Section 25.213(a). We have no reason to believe that TRW will fail to comply with these technical requirements.

11. TRW also must prevent harmful or unacceptable interference with the radio navigation-satellite service, aeronautical radionavigation systems, and fixed stations operating pursuant to Radio Regulation 730.[17] To prevent interference with radionavigation-satellite services, TRW expects that "mobile earth stations that comply with the e.i.r.p. [equivalent isotropically radiated power] density levels . . . will be able successfully to operate with the Odyssey system."[18] We remind TRW, however, that all its mobile earth stations must comply with the specific e.i.r.p. requirements stated in Section 25.213(b) of our rules in order to protect against unacceptable or harmful interference with radio-navigation-satellite services. In accordance with Sections 25.213(c) and (d), TRW has acknowledged its obligation to refrain from causing harmful or unacceptable interference to, or claim protection from, aeronautical radionavigation stations operating pursuant to Radio Regulation 732 and fixed service stations operating pursuant to Radio Regulation 730.[19]

Other Technical Issues

12. TRW requests authority to operate in the 1610-1622.60 MHz frequency band in the event we need to implement an interim sharing plan.[20] We grant its request to operate in the 1612-1622.60 MHz frequency band for the duration of our plan. The interim sharing plan will only be implemented, however, if the 1610-1612 MHz frequency band is unavailable for mobile satellite service operations when the first Big LEO system that is authorized to operate

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[10] Amendment of the Commission's Rules to Establish Rules and Policies Pertaining to a Mobile Satellite Service in the 1610-1626.5/2483.5-25 MHz Frequency Band, 9 F.C.C. Rcd. 5936 (1994) ("Big LEO Order").

[11] *Id.* at ¶ 31 (emphasis added).

[12] 47 C.F.R. § 25.143(b)(2); 47 C.F.R. § 25.213.

[13] TRW Amendment to Application at Attachment A at 5.

[14] *Id.*

[15] *Id.* at Attachment A at 10-11 (emphasis added).

[16] The "shut down" method requires precise knowledge of the satellite position and altitude, the orientation of the satellite, and the antenna pointing accuracy. TRW has not demonstrated how it would "shut down" the satellite antenna beams and how this would prevent a terminal from transmitting during periods of radioastronomy observations. Without a detailed technical showing, we cannot determine that TRW's use of the "shut down" method independent of precision position (determination techniques would comply with Section 25.213(a)(1).

[17] 47 C.F.R. § 25.213(b), (c) & (d).

[18] TRW Amendment to Application at 11.

[19] *Id.* at 11 n.16, & 12.

[20] TRW Amendment to Application at Attachment A at 2; Big LEO Order at ¶ ¶ 49-53.

in that band is launched. Consequently, we deny TRW's request to operate in the 1610-1612 MHz frequency bands while the interim plan is in effect.

13. We also deny TRW's proposal to use the 3900-4000 MHz and 6170-6180 MHz portions of the C-band for telemetry, tracking, and command subsystem ("TT&C") during the launch, deployment, orbit maintenance, and depositioning phases of its space stations.[21] These parts of the C-band are being used extensively by U.S.-licensed domestic and separate satellite geostationary, fixed- satellite service ("GSO/FSS") systems. The feasibility of sharing a common frequency band between non-GSO/FSS and GSO/FSS satellite systems has been studied extensively by the Negotiated Rulemaking Committee and Task Group 4/5 ("TG4/5") convened by the International Telecommunication Union ("ITU") to prepare for the upcoming World Radio Conference ("WRC-95").[22] TG4/5 indicated that co-directional sharing between non-GSO/FSS and GSO/FSS in these frequency bands is not practical and may not even be possible. In the absence of a technical showing by TRW concerning interference and sharing in the 4/6 GHz band, we will not permit TRW to use the 3900-4000 MHz and 6170-6180 MHz bands for TT&C operations.

14. If TRW operates Odyssey within the technical parameters it proposes and in accordance with the restrictions stated above, we are satisfied that TRW will meet the technical requirements detailed in Sections 25.143(b)(2) and 25.213.

Feeder Links.

15. TRW has requested feeder links in the 29.7-30.0 GHz (Earth-to-space) and 19.8-20.1 GHz (space-to-Earth) frequency bands.[23] As stated in our *Big LEO Order*, we are not in a position to assign feeder link frequencies unconditionally to any licensee.[24] Therefore, we will grant qualified applicants the authority to construct, at their own risk, mobile satellite systems capable of operating on the feeder link frequencies they have requested. We believe this is the type of "conditional" license contemplated by the *Big LEO Order*.[25] We will defer acting on requests to launch and operate using specific feeder link frequencies until that spectrum is available for assignment to Big LEO feeder links, and sufficient spectrum is available to satisfy the feeder link requirements of all licensed Big LEO systems, regardless of frequency band.[26]

16. Hughes Communications Galaxy, Inc. ("HCG") asserts that it is premature to license 28 GHz band (Ka-band) feeder links to TRW, whether conditionally or unconditionally.[27] HCG has filed an application for a domestic and global fixed satellite system that would use the 27.5-30.0 and 17.7-20.2 GHz frequency bands, some of the same frequencies proposed by TRW for feeder links. HCG argues that it is entitled to have its application considered concurrently and comparatively with TRW's feeder link proposal.[28] The Commission recently conducted a Negotiated Rulemaking Committee proceeding in an attempt to devise a sharing solution that would accommodate all services proposed in this band.[29] The negotiations concluded without the parties reaching a sharing arrangement.

17. We reject any assertion, however, that a license authorizing construction at the permittee's own risk would preordain the outcome of the ongoing 28 GHz Proceeding.[30] A grant of construction authority to TRW is in no way to be construed as a predisposition on any of the issues in the 28 GHz Proceeding, nor as a foreclosure of our options with respect to feeder link assignments to other Big LEO licensees.[31] All Big LEO applicants,including TRW, are on notice that any construction that they undertake in reliance on their individual feeder link requests in this proceeding is at their own risk.

18. HCG also argues that TRW's feeder link request constitutes a major amendment within the meaning of Section 25.116(b)(1) and (c)(1) of our Rules.[32] In the *Big LEO Order*, the Commission afforded applicants the opportunity to amend their applications to bring them into conformance with newly adopted requirements and policies for satellite systems.[33] It noted, for example, that a change from a geostationary satellite system configuration to a

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[21] *Id.* at Attachment A at 26 and Table 3. TRW also proposes that, during normal on-orbit operations, the TT&C functions will switch to the Ka-band feeder link frequencies.

[22] ITU Task Group 4/5, Contribution to the Consolidated CPM Report to the WRC-95, December 5, 1994. (ITU Task Group 4/5 is a Task Group of Study Group 4 concerning the fixed satellite service.)

[23] TRW Amendment to Application at 7.

[24] Big LEO Order at ¶ 166; Accordingly, we will not implement a construction milestone until authority to launch and operate a mobile satellite system using specific feeder link spectrum is granted. *See id.* at ¶ 189.

[25] Big LEO Order at ¶ 166.

[26] Big LEO Order at ¶ 166. We will afford permittees and applicants an opportunity to revise their requested feeder link bands, if necessary. Consistent with our usual practice, we will place revised requests on public notice and will provide the public an opportunity to comment.

[27] HCG, Consolidated Comments, (Dec. 22, 1994) at 2.

[28] HCG, Reply, (Jan. 13, 1995) at 10.

[29] Local Multipoint Distribution Service, 9 F.C.C. Rcd. 1394 (1994) ("28 GHz Proceeding").

[30] The Commission has a number of issues related to allocations of spectrum for Big LEO feeder links separately before it in several pending proceedings, including the 28 GHz Proceeding and Preparation for the World Radio Conference, 9 F.C.C. Rcd. 2430 (1994). Moreover, TG4/5 convened to prepare for the upcoming WRC-95, has concluded that Big LEO feeder links should not be authorized in the 29.5-30.0 GHz frequency band. If this is done at WRC-95, any Big LEO feeder link operation in that band will be subject to Radio Regulation 2613; that is, LEO satellites will be required to cease operation if LEO operations cause unacceptable interference to a geostationary satellite fixed satellite service system. In addition, it may have to accept interference from future GSO/FSS systems after the launch and initiation of the Odyssey system.

[31] We note that this authorization does not permit TRW to construct and operate mobile satellite service earth terminals or gateway earth terminals. Gateway earth stations will be licensed in accordance with technical requirements for the frequency band to be used. Also, standards are currently being developed to assure that mobile satellite service earth terminals, the Global Positioning System, and the Global Orbiting Navigation Satellite System ("GLONASS") can co-exist in adjacent frequency bands. *See* Memorandum of Understanding Between the FCC, NTIA and FAA, Pubic Notice 50736, November 19, 1994.

[32] TRW originally requested approximately 100 MHz of feeder link spectrum in each of the 29.5-30.0 and 19.7-20.2 GHz frequency bands. It now seeks 300 MHz of feeder link spectrum in the 29.7-30.0 and 19.8-20.1 GHz frequency bands.

[33] Big LEO Order at ¶ ¶ 58 & 59.

non-geostationary satellite system configuration to meet our system design requirement, or a change in coverage patterns to conform with our satellite visibility requirements, would not affect a particular application's status in the processing group. The Commission also indicated, however, that "a change that is not necessary to bring the application into conformance with our rules *and* which would increase frequency conflicts," would render the application newly filed under Section 25.116 of our Rules.[34] As an example, it stated that a design change from a CDMA to a TDMA/FDMA system, which would not facilitate spectrum sharing, would be a major amendment. Such applications would be considered in a future processing group, after January 1996.

19. TRW redesigned its system to facilitate the spectrum sharing plan adopted in the *Big LEO Order* by increasing the number of end users that can be served simultaneously. It appears that TRW's feeder link requests were a consequence of this redesign. Therefore we do not believe the changes in TRW's feeder link proposal should be considered major. Furthermore, even if the amendment were considered major within the meaning of Section 25.116 of the Rules, we would waive that rule in this case because (1) the modified system serves public interest by increasing system capacity and spectrum-use efficiency in the service links; (2) feeder link spectrum is for a use ancillary to the use of Big LEO spectrum; (3) the service is at a relatively early stage of development in which its spectrum requirements are still being addressed; and (4) any third parties who might be adversely affected by feeder link allocations will have a full opportunity to address potential interference concerns in other pending proceedings in connection with any further amendments to or modifications of TRW's feeder link proposal. Accordingly, we decline to treat TRW's application as newly filed.

Regulatory Treatment.

20. In accordance with our authority under Section 332(c)(5) of the Communications Act, 47 U.S.C. § 332(c)(5), we grant TRW's request that it be regulated as a non-common carrier.[35] As we determined in our *Big LEO Order*, Big LEO space station licensees providing service directly to end users must be regulated as common carriers if the service offering meets the definition of commercial mobile radio service ("CMRS").[36] However, if a Big LEO licensee offers space segment capacity to a reseller or other entity who then offers CMRS to end users, we have the discretion to determine whether to require the licensee to offer such service on a common carriage basis or to permit the offering to be made on a private carriage basis.[37] We concluded in the *Big LEO Order* that there does not appear to be a need to impose common carrier requirements on Big LEO licensees offering space segment capacity to resellers.[38] Because TRW does not plan to provide space segment capacity on Odyssey directly to end users,[39] we will allow TRW to operate as a non-common carrier.

Legal Qualifications.

21. MCHI claims that TRW is not qualified to become a licensee because TRW owned 19.9 percent of the common stock of Engineering Technologies Inc. which was the parent company of Defense Systems, Inc.[40] Defense Systems, Inc. was, in turn, an original minority investor in Constellation Communications, Inc., another Big LEO applicant. This argument is wholly without merit. Our rules do not prohibit multiple-ownership of satellite systems.

Effect of Decisions on Other Applications

22. In other decisions released today, the Bureau defers action on the applications of MCHI and Constellation until January 1996. Based on the intraservice sharing plan adopted in the *Big LEO Order*, it may not be possible to grant all remaining applications for Big LEO licenses. Nonetheless, in granting TRW's application we insulate TRW from any mutual exclusivity that may arise among the remaining applicants. In other words, while TRW's license is conditional in some respects, it will not be affected in any way if the Commission determines that all three of the remaining applicants are qualified for the two remaining licenses that can be awarded for the currently available spectrum.

III. ORDERING CLAUSES

23. Accordingly, IT IS ORDERED that Application File Nos. 20-DSS-P-91(12), CSS-91-015, 17-SAT-LA-95, and 18-SAT-AMEND-95 ARE GRANTED, and TRW Inc. IS AUTHORIZED to construct a mobile satellite system capable of operating in 1610-1626.5/2483.5-2500 MHz frequency bands in accordance with the technical specifications set forth in its applications and consistent with our rules unless specifically waived herein.

24. IT IS FURTHER ORDERED that TRW Inc. IS AUTHORIZED to launch and operate twelve low-Earth orbiting space stations and two technically identical spares during the license term for the purpose of providing a mobile satellite service in the United States in the 1610-1621.35/2483.5-2500 MHz frequency bands in accordance with the technical specifications set forth in its applications and consistent with our rules unless specifically waived herein. In the event the 1610-1612 MHz band is not available for mobile satellite service operations in the United States, TRW Inc. IS AUTHORIZED to operate in the 1612-1622.60/2483.5-2500 MHz bands.

25. IT IS FURTHER ORDERED that TRW Inc. IS AUTHORIZED to construct, at its own risk, a mobile satellite system capable of operating with feeder links in the 29.7-30.0/19.8-20.1 GHz frequency bands in accordance with technical specifications set forth in its applications and consistent with our rules unless specifically waived herein.

26. IT IS FURTHER ORDERED that TRW Inc. IS AUTHORIZED to offer space segment capacity on its satellite system on a non-common carriage basis.

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[34] *Id.* at ¶ 59 (emphasis added).
[35] 47 C.F.R. § 332(c)(5).
[36] Big LEO Order at ¶ 174.
[37] *Id.* at ¶ 175.
[38] *Id.* at ¶ 179.
[39] TRW Amendment to Application at 13.
[40] MCHI Consolidated Petition to Deny at 32 n.51.

27. IT IS FURTHER ORDERED that the license term for the space station constellation is ten years and will commence on the date the licensee certifies to the Commission that the first satellite in the system has been successfully placed into orbit and that the first transmission to or from that satellite in the authorized frequency bands has occurred.

28. IT IS FURTHER ORDERED that this authorization is subject to the completion of consultations under Article XIV of the INTELSAT Agreement and Article 8 of the INMARSAT Convention. Upon completion of these consultations, and notification by the Department of State that the United States has fulfilled its international obligations with respect to INTELSAT and INMARSAT, no further action by this Commission will be required.

29. IT IS FURTHER ORDERED that TRW Inc. will prepare any necessary submissions to the International Telecommunication Union (ITU) and to affected administrations in order to coordinate these space stations in accordance with the ITU Radio Regulations.

30. IT IS FURTHER ORDERED that the temporary assignment of any orbital planes, or of any particular frequencies, to TRW Inc. is subject to change by summary order of the Commission on 30 days' notice and does not confer any permanent right to use the orbit and spectrum. Neither this authorization nor any right granted by this authorization, shall be transferred, assigned or disposed of in any manner, voluntarily or involuntarily, or by transfer of control of any corporation holding this authorization, to any person except upon application to the Commission and upon a finding by the Commission that the public interest, convenience and necessity will be served thereby.

FEDERAL COMMUNICATIONS COMMISSION

Scott Blake Harris
Chief, International Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Motorola Satellite
Communications, Inc.

for Authority to Construct,	File Nos. 9-DSS-P-91(87)
Launch, and Operate a Low	CSS-91-010
Earth Orbit Satellite System	43-DSS-AMEND-92
in the 1616-1626.5 MHz Band	15-SAT-LA-95
	16-SAT-AMEND-95

ORDER AND AUTHORIZATION

Adopted: January 31, 1995; Released: January 31, 1995

By the Chief, International Bureau:

I. INTRODUCTION

1. Motorola Satellite Communications, Inc. ("Motorola") has filed an application[1] to construct, launch, and operate a low-Earth orbit ("LEO") mobile satellite system in the 1.6 GHz frequency band ("Big -LEO" service).[2] On November 15, 1994, Motorola amended its application in light of the rules and policies adopted by the Commission to govern the Big LEO service.[3] By Public Notice, Report No. DS-1481 (November 21, 1994), we sought comment on Motorola's amended application. In response, COMSAT Corporation ("COMSAT"), Constellation Communications, Inc. ("Constellation"), and Hughes Communication Galaxy, Inc. ("Hughes") filed comments. Mobile Communication Holdings, Inc. ("MCHI") filed a Consolidated Petition to Deny and Video/Phone Systems, Inc., ("Video/Phone") filed a Conditional Petition to Deny Motorola's application. Motorola filed a Consolidated Opposition and Reply Comments, to which Hughes, MCHI, Video/Phone, and American Mobile Satellite Corporation ("AMSC") filed replies. For the reasons discussed below, we grant Motorola's application, as amended, subject to certain conditions.

2. Motorola, a Delaware corporation, is a wholly owned subsidiary of Motorola, Inc., also a Delaware corporation. Motorola proposes to construct a LEO satellite system, Iridium, consisting of 66 satellites and up to twelve in-orbit spares. The system is projected to consist of eleven satellites in each of six orbital planes at an inclination of 86.4 degrees, providing continuous global coverage. Each operating satellite will circle the globe approximately 780 kilometers above the earth and will have inter-satellite links to and from adjacent satellites in the same orbital plane and adjacent orbital planes of its satellite constellation. Each satellite will also link to a network of "gateway" stations throughout the world, connecting the system with any subscriber unit and the Public Switched Telephone Network (PSTN). The satellites will contain an array of spot beams which will use digital cellular technology to communicate with subscriber units.

3. The system is intended to handle two-way voice and data communications between hand-held mobile terminals anywhere in the world and between such terminals and PSTN users. The Iridium satellite system will also be capable of providing radiodetermination satellite services.[4] The system will operate bi-directionally in a portion of the 1.6 GHz band and will employ a Time Division Duplex/Time Division Multiple Access/Frequency Division Multiple Access architecture ("TDD/TDMA/FDMA").[5] This architecture requires operation on discrete frequency band segments within the 1.6 GHz band. Motorola requests authority to construct its mobile service links capable of operating in the 1616-1626.5 MHz frequency band; its inter-satellite links in the 23.18-23.8 GHz band; its space-to-Earth feeder links in the 19.4-19.6 GHz band; and its Earth-to-space feeder links in the 29.1-29.3 GHz band.

4. Motorola does not anticipate providing any domestic satellite services over Iridium directly to the public. Instead, Motorola will be a wholesale supplier of Iridium's transmission capacity to network operators or service providers through U.S. gateways. These entities may provide services to end users or sell capacity in bulk to other service providers, or both. Therefore, Motorola requests authority to offer its space segment capacity on a non-common carrier basis.

II. DISCUSSION

5. *Financial Qualifications.* Applicants for space station authorization in the Big LEO service must demonstrate the financial qualifications set forth in Section 25.143(b)(3) of the Commission's rules, 47 C.F.R. § 25.143(b)(3). Specifi-

[1] The original application was filed on December 5, 1990. American Mobile Satellite Corporation filed a Petition to Deny and Communications Satellite Corporation filed comments. Motorola filed a responsive pleading. Thereafter, American Mobile Satellite Corporation, Communications Satellite Corporation, Constellation Communications, Inc., Hughes Aircraft Company, Loral Cellular Systems, Corporation, Ellipsat Corporation and TRW, Inc. filed reply comments. The matters raised in all petitions and comments have, except as addressed in this Order, been separately addressed through the adoption of service rules for Big LEO systems, or have otherwise been rendered moot through amendments to Motorola's application.

[2] Motorola requests authority to construct a mobile satellite system capable of operating in the 1616-1626.5 MHz frequency bands and to operate the system in the United States in the 1621.35-1626.5 MHz frequency bands for both Earth-to-space and space-to-Earth transmissions.

[3] *See* In the Matter of Amendment of the Commission's Rules to Establish Rules and Policies Pertaining to a Mobile Satellite Service in the 1610-1626.5/2483.5-2500 MHz Frequency Bands 9 F.C.C Rcd 5936 (1994) ("Big LEO Order").

[4] For more complete details of the services to be offered, *see* Application of Motorola Satellite Communications, Inc., For A Low Earth Orbit Mobile Satellite System (Dec. 5, 1990), at 22-33.

[5] TDD/TDMA is a transmission technique in which the same frequency band is used by both uplink and downlink transmissions in alternating time slots. FDMA provides multiple discrete channels with different frequencies. *See* Big LEO Order at 6 n.19.

cally, an applicant must demonstrate that it has the financial resources to meet the estimated costs of constructing and launching the system as well as operating it for one year after launch of the first satellite. This can be demonstrated through evidence of the company's current assets, operating revenues, or irrevocably committed debt or equity financing.[6] Any applicant relying on internal funding must also submit evidence of a firm management commitment to spend the necessary funds. Motorola states it will be relying on its parent corporation, Motorola, Inc., for the necessary funds, and has submitted a balance sheet and commitment letter from Motorola, Inc.[7] Motorola, Inc.'s total current assets at the end of the third quarter of 1994 were $8.471 billion.[8] Motorola estimates total costs of constructing and launching the Iridium system and operating it for one year after the launch of its first satellite to be $3.759 billion.[9]

6. MCHI alleges that Motorola has failed to provide the Commission with information sufficient to ensure its compliance with our financial requirements. First, MCHI claims Motorola cannot rely on the current assets and operating revenues of its parent because itintends primarily to fund its system from external sources and not internal assets or income.[10] MCHI submits that, based on Motorola's stated intent to seek external financing, it cannot reasonably claim at the same time to rely on internal funding.[11] MCHI also argues that Motorola's reliance on internal assets, despite its intent to seek outside sources of funding, calls its candor into question.

7. As Motorola notes in its opposition and reply comments, the *Big LEO Order* states that "[t]he availability of internal funds sufficient to cover a system's costs provides adequate assurance at the time the Commission acts on the application, that the system can be built and launched. Current assets provide a general measure of a company's ability to finance the project itself *or to raise funds from lenders and equity investors on the basis of its on-going operations*."[12] Motorola, Inc. has submitted evidence to show that it has current assets and operating income sufficient to construct the system, and has provided an unequivocal statement that it intends to expend the funds necessary to construct the proposed system.[13] The Commission's rules and policies do not require more.[14]

8. MCHI also contends the management commitment letter does not commit Motorola, Inc., to cover the full costs of the Iridium system, but only the costs of its subsidiary Motorola, in connection with the project.[15] Motorola represents that Motorola, Inc., is contractually bound to design, construct, launch, operate, and maintain the Iridium system, and Motorola's cost in connection with the system amounts to the total construction, launch, and operating expenses.[16] MCHI also asserts that Motorola's management commitment letter omits any reference to launch costs, indicating that Motorola, Inc. has not committed itself to meeting the cost of launching all of the satellites.[17] This argument is based on the omission of the word "launch" from a sentence in Motorola's management commitment letter,[18] which states: "[T]he parent corporation is fully committed to meeting the construction costs and operating expenses of the subsidiary in connection with its proposed IRIDIUM system." However, the letter goes on to state that "[T]he corporation's assets are sufficient to meet the costs of construction *and launch* of the entire constellation as well as the operating expenses for one year after launch of the first satellite."[19] Moreover, in its opposition, Motorola submitted an explanatory Declaration of Mr. Koenemann, the Executive Vice President and Chief Financial Officer of Motorola, Inc. Mr. Koenemann confirms that his earlier letter fully commits Motorola, Inc.'s management to funding the entire system, including launch costs.[20] We find this management commitment letter more than sufficient to demonstrate Motorola, Inc.'s commitment to funding the entire project.

9. MCHI also alleges that control over the Iridium system has passed from Motorola to Iridium, Inc. and consequently disqualifies Motorola from consideration in the current processing group.[21] This argument is based upon a contract between Iridium, Inc., and Motorola, Inc. and statements in Motorola, Inc.'s SEC disclosures regarding Iridium, Inc. The contract addresses the schedule which Motorola is to follow in constructing its system and obligates Iridium, Inc. to make payments as the schedule is met. It also contains limitations on Motorola, Inc.'s liability to Iridium, Inc. MCHI argues the contract shifted all control and ownership of the Iridium system from Motorola to Iridium, Inc.[22] Motorola responds that under this contractual arrangement, Iridium, Inc. is the investment vehicle by which Motorola is pursuing external financing for the system.[23] Motorola represents that it retains exclusive control over, and sole responsibility for, obtaining a license for the system as well as constructing, launching, operating, and maintaining the entire system.[24]

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[6] Section 25.143(b)(3) incorporates, as part of its financial qualification requirements, Sections 25.140(c) and (d) of the Commission Rules, 47 C.F.R. §§ 25.140 (c) and (d), which specify the necessary financial information that must be submitted to meet the financial qualification requirements.

[7] *See* Motorola Minor Amendment (Nov. 15, 1994), at Exhibit 1.

[8] *Id.* at 5.

[9] *Id.* at 4.

[10] MCHI Consolidated Petition to Deny (Dec. 22, 1994), at 15.

[11] *Id.* at 6; *see id.* at Exhibit 5 (excerpts of Motorola, Inc. SEC Form 10-Q at Liquidity and Capital Resources Section).

[12] *See* Big LEO Order at ¶ 31 (emphasis added); Motorola's Consolidated Opposition and Reply Comments (Jan. 3, 1995), at 2 ("Motorola Opposition").

[13] Motorola asserts that approximately $1.6 billion has been raised from strategic partners around the world. *See* Motorola Amendment at 5.

[14] We have also reviewed the alleged inconsistencies between Motorola's statements to the Commission and its statements in SEC filings concerning its financing plans. We conclude that the statements are consistent with Motorola, Inc.'s management commitment and raise no substantial, material question of fact as to Motorola's candor.

[15] *See* MCHI Consolidated Petition to Deny at 14-15.

[16] Motorola Opposition at 6.

[17] *See* MCHI Consolidated Petition to Deny at 15.

[18] *See* Motorola Amendment at Exhibit 1.

[19] *Id.* (emphasis added).

[20] *See* Motorola Opposition at Exhibit 1 at 2.

[21] MCHI Consolidated Petition to Deny at 16 and 19.

[22] *Id.* at 18, Exhibit 4, and Exhibit 5.

[23] Motorola, Inc. has reduced its ownership in Iridium, Inc. from 100% to approximately 29%.

[24] Motorola Opposition at iii.

10. To the extent that MCHI argues that the Motorola, Inc.-Iridium, Inc. contract undercuts Motorola, Inc.'s management commitment to the Iridium system, we reject that argument. With or without the contract, Motorola will be the licensee for this system, with ultimate responsibility for construction, launch, and operation. Motorola represents that Motorola, Inc. is contractually bound to perform these responsibilities, and Motorola, Inc. has firmly committed to do so. Nothing in the Motorola, Inc.-Iridium, Inc. contract shifts Motorola's ultimate responsibility or vitiates the firm financial commitment on which it relies.

11. There is no indication in the Motorola, Inc.-Iridium, Inc. contract that Motorola has relinquished ultimate responsibility for the satellite system to Iridium, Inc. or that title has passed to Iridium, Inc. Consequently, we cannot find that an impermissible transfer of control or a major change of ownership has taken place or that trafficking has occurred. Even if a "major" change in Motorola's ownership had occurred, we would find these ownership changes to be in the public interest pursuant to Section 25.116(c)(2) of the Commission's Rules.[25] We also reject MCHI's argument that the Motorola, Inc.-Iridium, Inc. contract impermissibly transfers control of the Iridium system to Iridium, Inc. Furthermore, in the significant amount of time that has passed since the Big LEO applications were filed, several of the applicants have entered into new business arrangements to take advantage of new financing possibilities. We recognize that some of these changes might be considered "major amendments" under Section 25.116 of the Commission's Rules.[26] Such a finding would normally require that the application be considered newly filed, and therefore ineligible for consideration in the processing group currently before us. However, our overriding concern in determining whether a "major amendment" has occurred is whether the applicant has attempted to profit from the sale of an application.[27] Unless there is evidence of this, we see no reason to prevent applicants from procuring partners to help to finance the enormous cost of these systems. We therefore find, on the entire record before us, that Motorola is financially qualified to be a Commission licensee in the Big LEO service.

12. *Technical Qualifications*. Applicants seeking authority to construct and launch Big LEO systems also must meet certain technical requirements. These requirements include: (1) using a non-geostationary satellite system design; (2) providing mobile satellite service to all locations as far north as 70^0 latitude and as far south as 55^0 latitude for at least 75 percent of every 24-hour period; (3) providing continuous service throughout the fifty states, Puerto Rico, and the U.S. Virgin Islands; and (4) preventing unacceptable interference to other authorized users of the spectrum.[28]

13. Motorola demonstrates that its proposed LEO system will comply fully with our system design and coverage requirements. The Iridium system satellites use non-geostationary satellite orbits and will provide continuous global coverage with approximately 2,150 transmission beams.[29] Iridium will also cover the contiguous United States as well as Alaska, Hawaii, Puerto Rico, and the U.S. Virgin Islands.[30] However, several parties have raised the possibility that Iridium's operations will cause unacceptable interference to other authorized services.

14. Section 25.213(a)(2) of the Commission's rules,[31] requires that space stations transmitting in the space-to-Earth direction in the 1613.8-1626.5 MHz band take whatever steps are necessary to prevent harmful interference to the United States' radio astronomy facilities during periods of observation.[32] Motorola indicates that it will fully coordinate Iridium's operations with the radio astronomy community.[33] It provides a copy of a Memorandum of Understanding (MOU) between itself and the National Radio Astronomy Observatory, which outlines the conditions under which Iridium may operate in the United States.[34] The MOU, however, only applies to two of the fifteen radio astronomy sites identified in Section 25.213(a). Motorola represents that similar agreements will be negotiated with respect to the other radio astronomy sites. We require Motorola to complete all radio astronomy site coordination before it initiates operation of the Iridium system. We also remind Motorola that it will have to terminate operations if unacceptable interference should occur to Radio Astronomy observation.

15. Motorola complies with all other interservice sharing requirements, including power flux density requirements for its in-band and inter-satellite links. COMSAT, however, alleges that Motorola's proposed downlink operation in the 1.6 GHz band might cause harmful interference to existing Inmarsat geostationary satellite receivers in the adjacent spectrum above 1626.5 MHz.[35] No technical analysis has been performed demonstrating that interference is likely, nor can we find on the basis of the technical proposals before us that Iridium's operations will interfere with those of Inmarsat. Nevertheless, Motorola must take into account the International Telecommunication Union (ITU) Radio Regulations 301, 305, and 306 and our domestic requirement for emissions in Section 25.202 of our rules.[36] We also recognize AMSC's concern over Motorola's omission of out-of-band emission specifications in Motorola's Amendment. AMSC can be assured however, that Motorola must comply with domestic and international emissions requirements as stated above.

16. Constellation requests that we explicitly condition Motorola's license on its ceasing operation in the event that it causes unacceptable interference to any Big LEO system

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[25] 47 C.F.R. § 25.116.
[26] 47 C.F.R. § 25.116.
[27] In this regard, the Big LEO service differs from services in which multiple or cross-ownership rules may require closer review of ownership changes. Furthermore, the Big LEO applicants have each proposed to operate as private carriers. Thus, concerns about ownership changes that may violate Section 310(b) of the Communications Act are considerably diminished.
[28] 47 C.F.R. § 25.143(b)(2); 47 C.F.R. § 25.213.
[29] Motorola Amendment at Exhibit 3 p. 1.
[30] *Id.*
[31] 47 C.F.R. § 25.213(a)(2).
[32] These facilities are listed in Section 25.213(a)(1)(i)-(ii).
[33] Motorola Amendment 1994 Exhibit 4 at 1.
[34] *Id* at attachment E4-2.
[35] COMSAT Corporation Comments on Minor Amendment (Dec. 22, 1994), at 2. American Mobile Satellite Corporation, ("AMSC") also expressed its support for the concerns raised by COMSAT, in AMSC's Reply on January 13, 1995 to Motorola Opposition.
[36] *See* 47 C.F.R. § 25.202(f).

operating in the Earth-to-space transmission direction in the 1610-1626.5 MHz band.[37] Constellation is apparently concerned that Motorola's downlink transmissions, which have secondary status under both the international and domestic Table of Frequency Allocations, will interfere with other Big LEO systems' uplink transmissions in that band, which have primary status.[38] We will not include such a condition in Motorola's license. Every space station license is conditioned on compliance with all of the Commission's rules, including the requirement that systems operating under a secondary services allocation not cause harmful interference to primary services.

17. *Feeder Links.* Motorola has requested gateway feeder links in the 19.4-19.6 GHz (space-to-Earth) and 29.1-29.3 GHz (Earth-to-space) frequency bands. As stated in our *Big LEO Order*, we are not in a position to assign specific feeder link spectrump unconditionally to any Big LEO licensee.[39] Therefore, we will grant qualified licensees the authority to construct, at their own risk, mobile satellite systems capable of operating with the feeder links they have requested.[40] We will defer acting on requests to launch and operate using specific feeder links until that spectrum is available for allocation to Big LEO feeder links, and sufficient spectrum is available to satisfy the feeder link requirements of all licensed Big LEO systems, regardless of frequency band.[41] We believe this is the sort of "conditional licensing" envisioned by the *Big LEO Order*.[42]

18. Hughes and Video/Phone assert that it is premature to license 28 GHz band (Ka-band) feeder links, whether conditionally or not. Hughes and Video/Phone have applied to build a fixed satellite system and local multi-point distribution service (LMDS) system, respectively, that would operate in Motorola's proposed feeder link frequencies. Hughes argues that granting feeder link frequencies to Motorola could preordain the outcome of the pending 28 GHz Rulemaking and deprive Hughes of the right to have its 28 GHz proposal considered simultaneously with Motorola's feeder link proposal.[43] Video/Phone asserts that these proposed feeder link bands will encumber LMDS system operations and asks the Commission to require Motorola to increase Earth-to-space feeder link equivalent isotropically radiated power ("e.i.r.p.") by at least 10 dBW.[44]

19. The Commission recently conducted a Negotiated Rulemaking in an attempt to devise a sharing solution that would accommodate all services proposed in this band. The negotiations ended without the parties reaching consensus on a sharing arrangement. We reject any assertion, however, that a license authorizing construction at the permittee's own risk would preordain the outcome of the 28 GHz Rulemaking Proceeding or would otherwise restrict the Commission's options in assigning this frequency band.[45] Awarding a grant of construction authority to Motorola is in no way to be construed as a predisposition on any of the issues in the 28 GHz Proceeding, nor as foreclosing our options with respect to feeder link assignments to other Big LEO satellite system licensees. Furthermore, all Big LEO applicants, including Motorola, are on notice that any construction that they undertake in reliance on their individual feeder link requests in this proceeding is at their own risk.

20. Hughes argues that Motorola's amended proposal to construct its feeder links across 200 MHz in each direction, instead of the 100 MHz it proposed in its initial application, constitutes a major amendment within the meaning of Section 25.116(b)(1) and (c)(1) of our rules.[46] According to Hughes, Motorola's proposal must therefore be considered a newly filed application outside of this processing group. We disagree. The Commission expressly indicated in the *Big LEO Order* that changes in Big LEO applications that resolve frequency conflicts with other pending applications, but do not create new or increased frequency conflicts, would not be treated as major amendments.[47] Motorola has indicated that it will not operate on more than 100 MHz of occupied bandwidth.[48] Motorola's request to construct its feeder links across 200 MHz but to operate on only 100 MHz will provide it with global coordination flexibility and should alleviate interference with other users.[49] Therefore, we do not believe the changes in Motorola's feeder link proposal should be considered as major. Furthermore, even if the amendment were considered major within the meaning of Section 25.116 of the rules, we would waive its

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[37] *See* Constellation Consolidated Comments, filed December 22, 1994, at 3.

[38] "Primary" services have equal rights to operate in particular frequencies. Stations operating in primary services are protected against interference from stations of "secondary" services. Moreover, stations operating in a secondary service cannot claim protection from harmful interference from stations of a primary service. *See* Big LEO Order at 7 n.21; 47 C.F.R. §§ 2.104(d) and 2.105 (c).

[39] Big LEO Order ¶ 166. Accordingly, we will not impose any construction milestone until authority to launch and operate a mobile satellite system using specific feeder link spectrum is granted. *Id.* at ¶ 189.

[40] Motorola's request for a waiver of Section 319(d) of the Communications Act, 47 U.S.C. § 319(d), to allow it to continue construction, at its own risk, is rendered moot by this decision. *See* 22-SAT-MISC-95.

[41] *Id.* We will afford permittees and applicants an opportunity to revise their requested feeder link bands, if necessary. Consistent with our usual practice, we will place any revised requests on public notice and will provide the public an opportunity to comment.

[42] Big LEO Order at ¶ 166.

[43] Consolidated Comments of Hughes (Dec. 22, 1994), at 2.

[44] *See* Video/Phone Conditional Petition to Deny (Dec. 22, 1994), at 6-7. Video/Phone contends that this would allow for a more intensive and economical utilization of the spectrum by LMDS operators. Earth station power levels will not be dealt with in this proceeding. We therefore will not require Motorola to increase its Earth-to-space feeder link e.i.r.p.

[45] *See* In the Matter of Rulemaking to Amend Part 1 and Part 2 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band and to Establish Rules and Policies for Local Multipoint Distribution Service, 9 F.C.C. Rcd. 1394 (1994) ("28 GHz Proceeding").

[46] *See* 47 C.F.R. §§ 25.116(b)(1)(c)(1); *see also* Reply Comments of Hughes (Jan. 13, 1995), at Exhibit 1.

[47] Big LEO Order at ¶ 58; *see also* 47 C.F.R. § 25.116(c)(1).

[48] Although Hughes indicates that Motorola's occupied bandwidth will now be 105 MHz, its calculations assume the data rate of the gateway/tracking, telemetry, and control ("TT&C") links to be approximately twice the data rate indicated in Motorola's application. *See* Motorola Amendment at Table R-A-1 (Rev 1). Although that table indicates that the satellites Motorola is constructing have the *capability* to operate at the data rates assumed by Hughes, Motorola does not indicate that it in fact intends to operate the satellites at those rates.

[49] *Id.* at Exhibit 5.

requirements in this case because (a) the modified system serves the public interest by increasing system capacity and spectrum-use-efficiency in the service links; (b) feeder link spectrum is for a use ancillary to the use of Big LEO spectrum; (c) the service is at a relatively early stage of development in which its spectrum requirements are still being addressed; and (d) any third parties who might be adversely affected by feeder link allocations will have a full opportunity to address potential interference concerns in other pending proceedings.[50] Accordingly, we decline to treat Motorola's application as newly filed.

21. We also note that this license does not authorize MSS earth terminals or gateway earth terminals. Gateway earth stations will be licensed in accordance with technical requirements for the frequency band to be used. Standards are also currently being developed to assure that MSS earth terminals, the Global Positioning System, and the Global Navigation Satellite System can coexist in adjacent bands.[51]

22. *Regulatory Treatment.* Pursuant to our discretion under Section 332(c)(5) of the Communications Act, we grant Motorola's request that it be regulated as a non-common carrier.[52] As we determined in our *Big LEO Order,* Big LEO space station licensees providing service directly to end users must be regulated as common carriers if the service offering meets the definition of commercial mobile radio service ("CMRS").[53] If a Big LEO licensee, however, offers space segment capacity to a reseller or other entity who then offers CMRS to end users, we have the discretion to determine whether to require the licensee to offer such service on a common carriage basis or to permit the offering to be made on a private carriage basis.[54] We concluded in the *Big LEO Order* that there does not appear to be a need to impose common carrier requirements on Big LEO licensees offering space segment capacity to resellers.[55] Because Motorola does not plan to provide space segment capacity on Iridium directly to end users, we will allow Motorola to operate as a non-common carrier.

23. *Effect of Decisions on Other Applications.* In orders released today, the Bureau defers action on the applications of MCHI and Constellation until January 1996. Based on the intraservice sharing plan adopted in the *Big LEO Order,* it may not be possible to grant all remaining applications for Big LEO licenses. Nonetheless, in granting Motorola's application we insulate Motorola from any mutual exclusivity that may arise among the remaining applicants. In other words, while Motorola's license is conditional in some respects, it will not be affected in any way if the Commission determines that all three of the remaining applicants are qualified for the two remaining licenses that can be awarded for the currently available spectrum.

III. ORDERING CLAUSES

24. Accordingly, IT IS ORDERED that Application File Nos. 9-DSS-P-91(87), CSS-91-010, 43-DSS-AMEND-92, 15-SAT-LA-95, 16-SAT-AMEND-95 IS GRANTED, and Motorola Satellite Communications, Inc. IS AUTHORIZED to construct a mobile satellite service capable of operating in the 1616-1626.5 MHz frequency band in accordance with the technical specifications set forth in its application and consistent with our rules unless specifically waived herein.

25. IT IS FURTHER ORDERED that Motorola Satellite Communications, Inc. IS AUTHORIZED to launch and operate 66 low-Earth orbiting space stations and 12 in-orbit spares, and to launch technically identical replacement satellites during the license term for the purpose of providing a mobile satellite service in the United States, in the 1621.35-1626.5 MHz frequency bands in accordance with the technical specifications set forth in its applications and consistent with our rules unless specifically waived herein.

26. IT IS FURTHER ORDERED that Motorola Satellite Communications, Inc. IS AUTHORIZED to construct, launch and operate a mobile satellite system with intersatellite links in the 23.18-23.8 GHz band in accordance with the technical specifications set forth in its application and consistent with our rules unless specifically waived herein.

27. IT IS FURTHER ORDERED that Motorola Satellite Communications, Inc. IS AUTHORIZED to construct, at its own risk, a mobile satellite system capable of operating with feeder links in the 19.4-19.6 GHz (space-to-Earth) frequency band and 29.1-29.3 GHz (Earth-to-space) frequency band in accordance with technical specifications set forth in its application and consistent with our rules unless specifically waived herein.

28. IT IS FURTHER ORDERED that Motorola Satellite Communications, Inc. IS AUTHORIZED to offer mobile satellite service on its satellite system on a non-common carriage basis.

29. IT IS FURTHER ORDERED that the license term for the space station constellation is ten years and will commence on the date the licensee certifies to the Commission that the first satellite in the system has been successfully placed into orbit and that the first transmission to or from that satellite in the authorized frequency bands has occurred.

30. IT IS FURTHER ORDERED that this authorization is subject to the completion of consultations under Article XIV of the INTELSAT Agreement and Article 8 of the INMARSAT Convention. Upon completion of these consultations, and notification by the Department of State that the United States has fulfilled its international obligations with respect to INTELSAT and INMARSAT, no further action by this Commission will be required.

31. IT IS FURTHER ORDERED that Motorola Satellite Communications, Inc. will prepare any necessary submissions to the International Telecommunication Union (ITU)

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[50] We note that the Commission has a number of issues related to the allocations of spectrum for Big LEO feeder links separately before it in several pending proceedings, including the 28 GHz Proceeding and Preparation for the World Radio Conference, (Notice of Inquiry in IC Docket No. 94-31), 9 F.C.C. Rcd. 2430 (1994).

[51] *See* Memorandum of Understanding Between the F.C.C, NTIA and FAA, Public Notice 50736, Nov. 19, 1994.

[52] 47 U.S.C. § 332(c)(5).

[53] Big LEO Order at ¶ 174.

[54] *Id.* at ¶ 175.

[55] *Id.* at ¶ 179.

and to affected administrations for coordination of these space stations in accordance with the ITU Radio Regulations.

32. IT IS FURTHER ORDERED that the temporary assignment of any orbital planes, or of any particular frequencies, to Motorola Satellite Communications, Inc. is subject to change by summary order of the Commission on 30 days' notice and does not confer any permanent right to use the orbit and spectrum. Neither this authorization nor any right granted by this authorization, shall be transferred, assigned or disposed of in any manner, voluntarily or involuntarily, or by transfer of control of any corporation holding this authorization, to any person except upon application to the Commission and upon a finding by the Commission that the public interest, convenience and necessity will be served thereby.

FEDERAL COMMUNICATIONS COMMISSION

Scott Blake Harris
Chief, International Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Mobile
Communications
Holdings, Inc.

for Authority to Construct,	File Nos. 11-DSS-P-91(6)
Launch, and Operate	18-DSS-P-91(18)
a Low Earth Orbit Satellite	11-SAT-LA-95
System in the 1610-1626.5	12-SAT-AMEND-95
MHz/2483.5-2500 MHz Band	

ORDER

Adopted: January 31, 1995; Released: January 31, 1995

By the Chief, International Bureau:

I. INTRODUCTION

1. Mobile Communications Holdings, Inc. ("MCHI") has filed an application to construct, launch, and operate a low-Earth orbit ("LEO") mobile satellite system in the 1.6/2.4 GHz frequency bands ("Big LEO" service.)[1] On November 16, 1994, MCHI amended its application in light of the rules and policies adopted by the Commission to govern "Big LEO" service.[2] By Public Notice, Report No. DS-1481 (November 21, 1994), we sought comments or petitions concerning MCHI's amended application. In response, Loral/Qualcomm Partnership, L.P. ("LQP"), TRW, Inc. ("TRW"), and Motorola Satellite Communications, Inc., each filed petitions to deny MCHI's application. AMSC Subsidiary Corporation ("AMSC") filed a "Petition to Defer Processing" of the Application, relief which Motorola also requests in the alternative. Constellation Communications, Inc., filed comments. MCHI filed a consolidated opposition. AMSC and TRW filed replies.[3]

2. In this *Order*, we conclude that MCHI has not demonstrated that it is financially qualified at this time under the Commission's rules and policies, and that further consideration of its application should therefore be deferred until January 1996. However, we reject Motorola's argument that MCHI's feeder link request requires us to treat the the application as newly filed and, therefore, not eligible for consideration with the current processing group for Big LEO licenses.

3. MCHI is a Delaware Corporation. The majority of its voting stock (71.12%) is held by DC Limited Partnership, another Delaware Corporation of which Dr. David Castiel holds 56.88% of the voting stock. Dr. Castiel is also the president and director of MCHI. MCHI's other voting shareholders are Venture First Associates (9.73%), Barclays de Zoete Wedd, Ltd. (5.72%) ("Barclays"), Israel Aircraft Industries (3.81%) ("IAI"), Fairchild Space and Defense Company (1.91%), Westinghouse Electric Corporation (1.91%) ("Westinghouse"), Cable & Wireless (1.91%), Harris Corporation (0.95%) ("Harris"), Spectrum Network Systems Limited (0.95%) ("SNS"), and AEC-Able Engineering Company, Inc. (0.95%) ("AEC-Able").

4. MCHI proposes to construct a satellite system consisting of 16 satellites, arrayed in three "constellations." Two constellations would consist of five satellites each, in inclined elliptical orbits. The third constellation would consist of six satellites in a circular equatorial orbital plane. The system would use Code Division Multiple Access ("CDMA") technology.

II. DISCUSSION

A. MCHI's Qualifications at This Time.

5. *Financial Qualifications.* In the *Big LEO Order* , the Commission noted that the enormous costs involved in constructing and launching a satellite system have historically made it particularly important that applicants for satellite licenses to use spectrum which is in high demand demonstrate, in advance, the financial ability to proceed with construction of their systems. It noted its repeated experience that licensees without sufficient available resources spend a significant amount of time attempting to raise necessary funding, and that those attempts often end unsuccessfully.[4]

6. The Commission observed that, "where a grant to an under-financed applicant may preclude a fully capitalized applicant from implementing its plans, and service to the public may be consequently delayed," a "stringent financial showing" is warranted.[5] The Commission also observed that the Big LEO spectrum sharing plan it adopted did not accommodate all pending applicants, and left little or no room for expansion of existing systems or the development of future mobile satellite systems in the United States. For these reasons, the Commission determined that a strict financial requirement was warranted for the Big LEO ser-

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[1] MCHI's predecessor in interest, Ellipsat Corporation, first filed its application on November 2, 1990. (For ease of reference, we will refer to MCHI and Ellipsat as MCHI in this *Order*.) In response to its application and an application filed by Motorola Satellite Communications, Inc. ("Motorola"), the Commission established a cut-off date of June 3, 1991, for filing applications to be considered concurrently with Motorola's and MCHI's. *See* Public Notice, Report No. DS-1068, 6 F.C.C. Rcd. 2083 (1991). In response to that *Notice*, MCHI filed an amendment. AMSC Subsidiary Corporation and Motorola filed petitions to deny. TRW, Inc., the Communications Satellite Corporation, and Constellation Communications, Inc., filed comments. MCHI filed a responsive pleading. The matters raised in those petitions and comments have, except as addressed in this *Order*, been separately addressed through the adoption of service rules for Big LEO systems, or have otherwise been rendered moot through amendments to MCHI's application.

[2] *See In re Amendment of the Commission's Rules to Establish Rules and Policies Pertaining to a Mobile Satellite Service in the 1610-1626.5/2483.5-2500 MHz Frequency Bands*, 9 F.C.C. Rcd. 4936 (1994) (the "*Big LEO Order*").

[3] LQP, TRW, Motorola, Constellation and AMSC all have competing Big LEO license applications pending before us.

[4] *Big LEO Order* at ¶ ¶ 26-30.

[5] *Big LEO Order* at ¶ 26.

vice, and adopted a rule requiring that Big LEO applicants demonstrate committed internal or external financing sufficient to meet their systems' construction, launch, and first-year operating costs.[6]

7. Consequently, the financial qualification rules adopted for the Big LEO service require applicants for space stations to demonstrate that they, or their corporate parents, have current assets (cash, inventory, and accounts receivable) and operating income sufficient to cover the costs of construction and launch of the system's space segment, and of operating for one year following the launch of the first satellite. The Commission also requires that applicants submit evidence of a management commitment, from the applicant or its parent corporation(s), as appropriate, to expend the necessary funds. Alternatively, applicants relying on external financing, such as bank loans, must demonstrate that such financing is "irrevocably committed," *i.e.*, that it has been approved and does not rest on contingencies that require action by either party to the transaction.[7]

8. MCHI estimates that the costs of construction, launch, and first-year operation for its sixteen-satellite system total $564 million. To demonstrate its ability to finance this venture, MCHI relies primarily on commitments from its parent corporations and on financing commitments from several of its vendors. On November 16, 1994, MCHI's financial showing[8] consisted of:

> 1) MCHI's balance sheet, listing current assets of $309,645;
>
> 2) Management letters from Westinghouse, Harris, IAI, and Barclays describing their commitments to MCHI's satellite system, as well as annual reports or other financial information concerning those companies;
>
> 3) A letter from SNS describing its commitment to acquire exclusive distribution rights for mobile satellite service in selected countries using MCHI's system;
>
> 4) Letters from Arianespace, AEC-Able, and Satellite Transmission Systems, potential vendors of the equipment or services to be used in connection with MCHI's satellite system, concerning financing arrangements they would be willing to make in connection with MCHI's equipment or service purchases;
>
> 5) A letter from Barclays providing its opinion, as an investment bank, that, subject to a number of assumptions, financing could be arranged for up to twenty percent of the construction, launch, and operation costs.

9. Each of the other applicants for a Big LEO license argues that MCHI's showing is insufficient under the Commission's rules, in that the commitments from MCHI's shareholders are insufficiently firm to meet Commission standards. They also argue that, while some of MCHI's arrangements for vendor financing may meet Commission standards, those commitments fall far short of the $564 million needed to construct the system.

10. MCHI responded by submitting additional information concerning its financial plan. It submitted a revised balance sheet for MCHI, reflecting an increase in current assets to $1,260,185. The revised balance sheet also includes notes indicating that MCHI has entered into irrevocable contracts for a total of $14.1 million in financing. It also submitted an overview of its financial plan, dividing its sources of funds into three categories -- what it describes as "internal" sources, vendor financing, and "other" sources. The overview indicates that MCHI is relying on internal funding, involving "total management commitments" of "$600,000,000+" from itself and four of its shareholders, IAI, Westinghouse, Harris, and Barclays. The amounts of the commitments from each particular shareholder are unspecified.[9] MCHI also relies on what it characterizes as committed vendor financing from a number of sources, including Arianespace ($45 million), AEC-Able Engineering ($93 million), ESKOS ($160 million), Satellite Transmission Systems ($10 million), IBM ($5.0 million), NorthernTelecom ($4.0 million), CSC ($3.0 million), and Spectrum Astro ($206.0 million). It also relies on "other" sources of funds, including what it characterizes as committed funds from Spectrum Network Systems ($100 million) and Voyager Communications ($5 million).

11. Except with respect to the $1.26 million reflected in MCHI's balance sheet, the sources of funding that MCHI characterizes as "internal" are not sufficiently definite to meet Commission requirements. Specifically, while the letters and other documentation submitted from Westinghouse, IAI, Harris, and Barclays include general statements of support for MCHI's application, they do not establish management commitments to expend the funds necessary to construct, launch, and operate the space segment of MCHI's proposed system. We address each commitment below.

12. MCHI claims that Westinghouse's commitment is evidenced by a letter from Milton F. Borkowski, a Vice-President of Westinghouse's Electronic Systems Group. Mr. Borkowski states that Westinghouse is involved in the MCHI project as a supplier and developer of ground network and terminals. He states that "Westinghouse, as a member of the [MCHI] team, has committed significant financial resources and the support of its engineers to the development project, and we are committed to continue the support of the team's efforts to move forward to completion of an operating system . . . ." Westinghouse does

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[6] *Big LEO Order* at ¶ ¶ 30-32.

[7] These requirements, and the documentation necessary to establish they have been met, are set forth in greater detail at 47 C.F.R. § 25.140(c) and (d). *See also* 47 C.F.R. § 25.143(b)(3); *Big LEO Order* at ¶ 35.

[8] The showing was submitted with a request for confidential treatment. That request was denied. *See Order*, DA 94-1322 (Int'l. Bur. Nov. 25, 1994). MCHI substantially narrowed its request; that request was granted. *See Order on Reconsideration*, DA 94-1566 (Int'l. Bur. Dec. 21, 1994), *app. for rev. pending.*

[9] In a different portion of its filing, MCHI appears to rely on another shareholder, SNS, as a source of internal funding. However, SNS is listed as an "other" source of funds in the overview of MCHI's financial plans. We address the SNS commitment more fully, *infra*. We note, however, that to the extent MCHI intends to rely on SNS as an "internal" source of funds, it has not submitted evidence adequate to demonstrate that SNS has necessary financial resources."

not indicate how much financing it has committed or to what extent it plans to support "the team" financially. In fact, Westinghouse's involvement appears limited to serving as a supplier of ground segment facilities, and as a holder of a less than 2% interest in MCHI. While MCHI points to evidence that Westinghouse has been active in arranging vendor financing for MCHI, that financing also appears to be for ground segment facilities. Accordingly, we cannot find that Westinghouse has made a financial commitment to expend funds necessary to construct, launch, and operate MCHI's space segment, as our rules require.

13. With respect to IAI, MCHI submits a letter, dated November 8, 1994, from Shmuel Peretz, IAI's Vice President-Finance. Mr. Peretz's November 8 letter notes the involvement of other MCHI shareholders, and states that IAI, "as a team member with other MCHI partners, [is] prepared to support MCHI's efforts to raise the necessary funds in the financial market for [MCHI's] system . . . ." MCHI also submits a further letter from Mr. Peretz, dated January 3, 1995, in which Mr. Peretz indicates that IAI has arranged vendor financing for launch expenses with ESKOS, S.A., the official representative of the Russian Space Agency, and has obtained a letter of intent from CLAL Industries Ltd. "for the finance of up to US$40 Million of the IAI workshare" in MCHI's system. Mr. Peretz's January 3 letter describes these arrangements, as well as some financial details concerning IAI, and indicates that IAI has reviewed MCHI's application and business plan and is confident that the project will succeed in the marketplace. Mr. Peretz closes by indicating that, "*[b]ased upon all of the above,* we are *therefore* prepared to expend the necessary funds to support" MCHI's project (emphasis added).

14. Read in context, IAI's statements suggest that it views the "necessary" expenditures as something less than the full amount of MCHI's projected costs, and that IAI's commitment is contingent on MCHI reaching agreements with other MCHI equity holders that they will shoulder some unspecified share of MCHI's estimated costs.[10] Precisely how much less than the full amount IAI intends to commit is unclear. In light of IAI's relatively small (3.81%) equity interest in MCHI, IAI may mean, for example, that the "necessary" funds constitute a 3.8% share of MCHI's cost. It does not say so, however. In fact, Mr. Peretz's letters do not clearly indicate whether IAI contemplates making any expenditures, or the amount of those expenditures, except for the "expenditures" in connection with its proposed agreements with ESKOS and CLAL. Therefore, in the absence of an explicit and unequivocal statement to the contrary, we can only construe IAI's commitment as being conditioned on the participation of ESKOS and CLAL, and involving no independent commitment beyond expenditures in connection with those agreements. This type of contingent commitment indicates no more than an interest in assisting the applicant in obtaining financing, in this case from ESKOS and CLAL. Such arrangements are inadequate to meet our financial standards.[11] Accordingly, we give no weight to IAI's commitment, except insofar as the ESKOS and CLAL arrangements separately satisfy the requirements of our rules.

15. With respect to ESKOS, MCHI submits a one-page letter from V. Kouznetsov, ESKOS's President, in which ESKOS "confirms its intention" to launch eight of MCHI's satellites in return for equity in MCHI, "calculated at the rate of the most recent post-license transaction." Mr. Kouznetsov indicates that the launch services "could be accomplished" with "four launch vehicles at a cost of U.S. $160 million, if services are rendered not later than 1998." This does not appear to be a fully negotiated agreement between ESKOS and MCHI, and there is no indication that any such agreement exists.[12] Several key terms, such as the amount of ESKOS's potential equity investment, are also omitted.[13] ESKOS's commitment amounts to little more than an expression of interest in purchasing an unspecified equity share. This is inadequate under our cases.[14]

16. With respect to CLAL, MCHI submits a letter from CLAL to IAI in which CLAL indicates its intent to invest $40 million "toward the workshare of IAI . . . . Such intention is subject to, among others, (i) the finalizing of the specific terms of the proposed financing, (ii) the finalizing of the necessary business agreement with IAI regarding CLAL's equity and workshare participation in the Project. . . ." The conditions outlined in the letter render it inadequate to demonstrate financial qualifications.[15]

17. MCHI attempts to demonstrate Harris's commitment by submitting a letter from Dr. Bill C. Tankersley, Director, Space Systems, in which Dr. Tankersley indicates that Harris "has committed significant financial and technical resources to the development project to date. We are committed to continuing this support under the terms of our present business agreement with MCHI." In a subsequent letter, Phillip W. Farmer, President and Chief Operating Officer, reiterates Dr. Tankersley's statement of support. MCHI, however, has not presented any evidence as to the extent of Harris's financial support or the business arrangements between it and Harris, other than noting Harris is a 1% shareholder in MCHI. Harris's statements could well be made by any potential vendor who had agreed to take a small equity share in a new venture in return for early developmental work. While such arrangements can be significant, the documentation submitted by MCHI does not show that Harris is immediately prepared to contribute any portion of the substantial additional expenditures necessary to complete the project, as required by our rules.

18. With respect to Barclays, MCHI submits a letter from Trevor Nash, Director, in which Mr. Nash states Barclays' commitment "as financial advisor" to MCHI, and indicates that "we will continue to commit our worldwide professional resources" to MCHI. A commitment to provide merely advisory services does not constitute a financial commitment and cannot be used to demonstrate MCHI's qualifications.[16]

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[10] *See* 47 C.F.R. § 25.140(d)(2)(ii), (iii).

[11] *See, e.g., United States Satellite Systems, Inc.*, 103 F.C.C.2d 888, ¶ 4 (1985).

[12] *See Equatorial Communications Services*, 103 F.C.C.2d 631, ¶ 4 (1985)(memorandum of understanding, without fully negotiated agreement, cannot be used as evidence of financial qualifications).

[13] *See* 47 C.F.R. § 25.140(d)(2)(iii).

[14] *See National Exchange, Inc.*, 103 F.C.C.2d 863, ¶ 7 (1985).

[15] *See* 47 C.F.R. § 25.140(d)(2).

[16] *Equatorial Communications Services*, 103 F.C.C.2d 631, ¶ 5 (1985); *United States Satellite Systems, Inc.*, 103 F.C.C.2d 888 at ¶ 4.

19. In addition to these "internal" sources, MCHI has submitted evidence of vendor and other financing arrangements. These arrangements are also inadequate to establish MCHI's financial qualifications.

20. MCHI has submitted evidence of vendor financing, arranged by Westinghouse, for various ground segment facilities. The vendors "are Satellite Transmission Systems, IBM, Northern Telecom, and CSC. These arrangements are not relevant under our financial standard, since they do not involve the construction and launch of the system's space segment, or first-year operating expenses.

21. MCHI also relies on vendor financing for satellite system construction and launch services from Arianespace, Spectrum Astro, and AEC-Able. With the possible exception of Arianespace's agreement to provide $45 million in launch services, these agreements do not appear to be fully negotiated, as evidenced by the fact that MCHI has not submitted detailed terms of the transactions as required by Section 25.140(d)(2) of the Commission's rules.[17] Furthermore, AEC-Able explicitly indicates that it is agreeing only to "arrange financing," but there is no indication that this financing has been arranged.[18] This commitment is not significantly different than Arianespace's commitment to arrange financing with European banks of an additional $255 million of MCHI's launch costs, funds which MCHI itself, in the overview of its financial plan submitted with its opposition, declines to characterize as "committed." At best, therefore, MCHI can claim vendor financing of $45 million.[19]

22. Finally, MCHI relies on what it characterizes as "other" sources of funding. MCHI lists as "committed" $100 million from Spectrum Network Systems ("SNS") and $5 million from Voyager Communications. The SNS letter submitted with MCHI's amendment states that the terms of the arrangement "would be" that it "will, prior to January 31, 1995, acquire" an 80% interest in distribution rights for MCHI's service in certain countries. This "final agreement" is apparently subject to further negotiation, including negotiations with a third party. Therefore, it does not provide evidence ofp financial qualifications under our rules.[20] Furthermore, to the extent SNS, because of its .95% stock interest in MCHI, is considered an internal investor, its stated commitment to provide "necessary funds" appears to be limited to the $100 million contemplated by the not-yet-fully-negotiated agreement for distribution rights. With respect to the Voyager agreement, which apparently involves the sale of distribution rights for its system, MCHI has not provided sufficient information to allow us to determine whether it meets the requirements of our rules. Finally, even if both agreements were fully negotiated and complied with our rules, they would still leave MCHI far short of meeting its estimated costs of $564 million.[21]

23. Thus MCHI's documentation of its financial qualifications is generally of the type which the Commission has summarily rejected as insufficient under our rules. MCHI's financial showing clearly evidences a number of arrangements which may, between now and January 1996, develop into commitments which, in the aggregate, would be sufficient to meet MCHI's estimated costs. However, at this time no single source on which MCHI relies appears willing or able to fund MCHI's estimated costs, and few have even indicated a definite amount they might be willing and able to commit. Viewing all these sources of funds in the aggregate, we must conclude they fail to demonstrate MCHI's financial ability to proceed immediately to construct, launch, and operate its system.[22]

B. Future Processing Status of MCHI's Application

24. Several of the parties opposing MCHI's application urge us to dismiss the application if we find MCHI is not financially qualified. We will not do this. In the *Big LEO Order*, we afforded applicants until January 31, 1996 to demonstrate financial qualifications. We cannot find that because MCHI has submitted an inadequate showing, it should lose its status in this processing group. Neither the *Big LEO Order* nor our rules indicate any such intent, and we would expect the Commission to provide explicit notice of such a policy. Indeed, to hold otherwise would unfairly penalize applicants who, in good faith, file a system application we later find does not conform with our rules. Therefore, consistent with the Commission's stated goal in adopting the deferral mechanism -- to provide applicants with an opportunity to finalize financial arrangements over the next year -- we will defer action on MCHI's application rather than dismiss it.

25. *Feeder Links.* MCHI originally requested feeder links in the Big LEO service link frequencies, 1610-1626.5 MHz and 2483.5-2500 MHz. On November 16, MCHI amended its application, requesting feeder links at 15.4 -15.7 GHz (Earth-to-space)and 6725-7025 MHz (space-to-Earth), operating in reverse band mode. Motorola argues that MCHI's amended request for feeder link frequencies constitutes a major amendment under Section 25.116 of our rules.[23] It claims that the amendment was not necessitated by the new policies and rules established in the *Big LEO*

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[17] With respect to Spectrum Astro, MCHI also submits a letter, substantially in the form of letters submitted in this proceeding to indicate a management or parent company commitment. To the extent this letter is intended to evidence Spectrum's "commitment" to the project as an internal financier, it is not accompanied by evidence of Spectrum's financial capability, which must be submitted in connection with internal financing. 47 CFR § 25.140(d)(1); *Big LEO Order* at ¶ 35.

[18] *See Equatorial Communications Services*, 103 F.C.C.2d 631, ¶ 4 (1985).

[19] MCHI also submits a letter from Banque Nationale de Paris indicating its "interest in principle" in "assisting" MCHI in arranging financing, "on a best effort basis," subject to, among other things, Export Credit Agency guarantees, and "completion of the overall financing of the project." This letter is patently insufficient under 47 C.F.R. § 25.140(d)(2).

[20] *Equatorial Communications Services*, 103 F.C.C.2d 631, ¶ 4 (1985).

[21] MCHI lists its agreement with Cable and Wireless as an "other" potential source of funding. Specifically, Cable and Wireless acquired a 2% equity interest in MCHI and what Cable and Wireless describes as an option to increase its participation in MCHI. An option to invest additional funds represents the type of arrangement, contingent on further performance by one of the parties, that is insufficient for purposes of demonstrating financial qualifications. *See* 47 C.F.R. § 25.140(d)(2)(iii).

[22] MCHI also argues that its financial plan is at a more advanced stage than the plans of other applicants. We have, by separate orders, addressed MCHI's objections to the other applicants' financial showings.

[23] 47 C.F.R. § 25.116.

Order, and that it increases the potential for interference without resolving any frequency conflicts. Motorola also claims the amended request will decrease the likelihood that there will be enough spectrum available for all the applicants in their desired feeder link bands, and that such requests will further delay unconditional licenses to Motorola as well as other system operators.

26. MCHI replies that our global coverage standard for LEO systems requires its feeder- link amendment. MCHI also observes that its feeder links do not increase frequency conflicts with existing services, nor with Motorola.

27. In the *Big LEO Order*, the Commission afforded applicants the opportunity to amend their applications to bring them into conformance with newly adopted requirements and policies for satellite systems. It noted, for example, that a change from a geostationary system configuration to a LEO configuration to meet our system design requirement, or a change in coverage patterns to conform with our satellite visibility requirements, would not affect a particular application's status in the processing group. It also indicated, however, that "a change that is not necessary to bring the application into conformance with our rules *and* which would increase frequency conflicts," would render the application newly filed under Section 25.116 of the Rules.[24] As an example, it stated that a design change from a CDMA to a TDMA/FDMA system, a change which would not facilitate spectrum sharing for Big LEO service links, would be a major amendment. Such applications would be considered in a future processing group, and after those applications deferred for consideration until January 1996.

28. MCHI redesigned its system to facilitate the spectrum sharing plan adopted in the *Big LEO Order* by increasing the number of end users that can be served simultaneously. It appears that MCHI's amended feeder link requests were a consequence of this redesign. Therefore, we do not believe the changes in MCHI's feeder link proposal should be considered major. Furthermore, even if the amendment were considered major within the meaning of Section 25.116 of the Rules, we would waive that rule in this case because (a) the modified system serves the public interest by increasing system capacity and spectrum-use efficiency in the service links; (b) feeder link spectrum is for a use ancillary to the use of Big LEO spectrum; (c) the service is at a relatively early stage of development in which its spectrum requirements are still being addressed; and (d) any third parties who might be adversely affected by feeder link allocations will have a full opportunity to address potential interference concerns in other pending proceedings[25] or, in the event MCHI ultimately establishes its financial qualifications, in connection with any further amendments to or modifications of MCHI's feeder link proposal. Accordingly, we decline to treat MCHI's application as newly filed.[26]

III. CONCLUSION AND ORDERING CLAUSE

29. For the reasons stated, we cannot find at this time that MCHI is financially qualified to construct, launch, and operate the Big LEO system it proposes. In light of this conclusion, we need not address MCHI's technical qualifications and we express no opinion on that issue. We reject, however, the parties' arguments that MCHI has forfeited its right to further consideration with the second portion of this processing group. MCHI will therefore have until January 1996 to firm up its financial qualifications, in accordance with the *Big LEO Order*.[27]

30. IT IS FURTHER ORDERED, that application file Nos. 11-DSS-P-91(6); 18-DSS-P-91(18); 11-SAT-LA-95; 12-SAT-AMEND-95 ARE DEFERRED, subject to Mobile Communications Holdings, Inc., submitting a showing demonstrating its financial qualifications no later than January 31, 1996.

FEDERAL COMMUNICATIONS COMMISSION

Scott Blake Harris
Chief, International Bureau

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[24] *Big LEO Order* at ¶ 59 (Emphasis added).

[25] We note that the Commission has a number of issues related to the allocations of spectrum for Big LEO feeder links separately before it in several pending proceedings, including the *28 GHz Proceeding*, (Second Notice of Proposed Rule Making in CC Docket No. 92-297), 9 F.C.C. Rcd. 1394 (1994), and *Preparation for the World Radio Conference*, (Notice of Inquiry in IC Docket No. 94-31), 9 F.C.C. Rcd. 2430 (1994).

[26] In its consolidated opposition, MCHI also reargues issues raised in a May 2, 1991, objection and in a May 31, 1991, petition for reconsideration, *Geostar Positioning Corporation*, 6 F.C.C. Rcd. 2276 (Comm. Car. Bur. 1991). MCHI objects to the acceptance of applications other than its own. The Commission in the *Big LEO Order* effectively overruled any objections to consideration of the other pending applications by developing a spectrum sharing plan and licensing rules premised on six pending applications. Therefore, we will not further address MCHI's contentions in this *Order*.

[27] *Big LEO Order* at ¶ ¶ 40-41.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: February 1, 1995

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON BELL ATLANTIC'S NOTIFICATION OF ENHANCED SERVICE MARKET TRIAL FOR VIDEO DIALTONE SERVICE AND WAIVER OF TRIAL NOTIFICATION

(CC DOCKET NO. 88-616)

On January 24, 1995, Bell Atlantic - Virginia, Inc. (Bell Atlantic) filed a notification of its intent to conduct a video dialtone market trial in Northern Virginia during which a partially structurally unseparated affiliate will provide enhanced video services. Bell Atlantic states that the trial is scheduled to last six months and will serve approximately 2,000 homes. Bell Atlantic plans to use Asymmetric Digital Subscriber Line technology that permits integrated transmission of telephony, data, and video over standard telephone lines. Bell Atlantic states that Bell Atlantic Video Services, Inc. (BVS), a separately incorporated affiliate, will participate in the trial as a programmer and will engage in the selection, packaging, pricing, and production of the video programming it provides. Bell Atlantic adds that BVS will provide its own level two gateway and video storage server for the programming it provides.

In its filing, Bell Atlantic describes its plans for complying with the Commission's conditions for conducting enhanced services market trials. *See BOC Notices of Compliance with CEI Waiver Requirements for Market Trials of Enhanced Services*, 4 FCC Rcd 1266 (1989). Bell Atlantic adds that if any joint marketing activities are undertaken, BVS will comply with the separate subsidiary provisions of the *Computer II* rules during the trial.

Bell Atlantic also requests a waiver of the ninety-day advance notice requirement for market trials. Bell Atlantic states that enhanced service providers received public notice that it intended to conduct a market trial of video dialtone-related enhanced services over a year ago when it filed a Section 214 application containing all the relevant information that the Commission requires in a market trial waiver, and that nothing will be gained by a further delay.

Interested parties should file comments on Bell Atlantic's filing by **February 21, 1995**, and reply comments by **March 3, 1995**, with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: ITS, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Bell Atlantic's filing is available for inspection and copying, during normal business hours, in the FCC's Dockets Branch (Room 239), 1919 M Street, N.W., Washington,D.C. 20554. Copies also can be obtained from ITS at (202) 857-3800.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally* 47 C.F.R. §§ 1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 418-1579.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: February 1, 1995

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON BELL ATLANTIC'S COMPARABLY EFFICIENT INTERCONNECTION PLAN FOR ENHANCED VIDEO SERVICES

On January 27, 1995, the Bell Atlantic Telephone Companies (Bell Atlantic) filed a comparably efficient interconnection (CEI) plan for its proposed video dialtone-related enhanced services. Bell Atlantic plans to offer video dialtone services in several areas upon approval of its pending Section 214 applications. Bell Atlantic states that it filed the CEI plan because the Commission has found that enhanced services associated with the provision of video dialtone services should be treated the same as any other enhanced service.

Recently, the United States Court of Appeals for the Ninth Circuit remanded to the Commission the *Computer III* decisions. In order to avoid disruption in the provision of enhanced services, the Commission required that the Bell Operating Companies file CEI plans for any new enhanced services that they intend to provide. (*See In the Matter of Bell Operating Companies' Joint Petition for Waiver of Computer II Rules*, DA 95-36, released Jan.11, 1995). Pursuant to that decision, Bell Atlantic requests approval of its CEI plan so that it can offer, on a structurally unseparated basis, video programming content and interactive services and a Level Two Gateway, and other related enhanced services as needed that use video dialtone and other tariffed, basic services. As required in the *Computer III* proceeding (*Phase I Order*, 104 FCC 2d 958 (1986), *modified on reconsideration*, 2 FCC Rcd 3035 (1987), *further reconsideration*, 3 FCC Rcd 1135 (1988)), the Commission must approve this CEI plan before Bell Atlantic can begin implementing the proposed service on an unseparated basis.

In its filing, Bell Atlantic describes how it will satisfy the Commission's CEI parameters, and states that it will account for the joint and common costs of the services pursuant to its cost allocation manual. Bell Atlantic also describes its plans for complying with the other *Computer III* nonstructural safeguards governing the use of customer proprietary network information, non-discrimination reporting, and disclosure of network information. Bell Atlantic requests that the Commission act expeditiously on its plan because it has been authorized to construct and operate video dialtone facilities in some areas.

Interested parties should file comments on this plan by **February 21, 1995**, and reply comments by **March 3, 1995**, with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington,D.C. 20554, and to the Commission's contractor for public service records duplication: ITS, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the plan can be obtained from ITS at (202) 857-3800.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally* 47 C.F.R. §§ 1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 418-1579.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

WT Docket No. 94-148

In the Matter of

Reorganization and Revision of
Parts 1, 2, 21, and 94 of
the Rules to Establish a New
Part 101 Governing Terrestrial
Microwave Fixed Radio Services

ORDER

Adopted: January 31, 1995; Released: February 2, 1995

By Chief, Wireless Telecommunications Bureau

1. Before the Bureau is a request for additional time within which to respond to the Commission's Notice of Proposed Rulemaking (NPRM) in WT Docket No. 94-148, filed by Fixed Point-to-Point Communications Section, Network Equipment Division of the Telecommunications Industry Association (TIA). In support of this request, TIA states that the proposed changes are complex. As the principal industry association representing microwave manufacturers, it needs time to coordinate among its members to ensure that the Association's comments reflect industry consensus. Additionally, it notes, the NPRM was released during the year-end holidays, which reduced the amount of available time for review.

For the foregoing reasons, IT IS HEREBY ORDERED that the time within which to file comments in this proceeding is extended to **February 17, 1995** and the deadline for filing reply comments is extended to **March 17, 1995**.

FEDERAL COMMUNICATIONS COMMISSION

Robert H. McNamara
Acting Chief, Private Radio Division
Wireless Telecommunications Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:

Armstrong Utilities, Inc.	CUID Nos. MD0162, OH0142,
Elkton, Maryland	OH0188, OH0603, OH0883,
Orrville, Ohio	and PA2687
Youngstown, Ohio	
Austintown, Ohio	
Medina, Ohio	
Sarver, Pennsylvania	

Request to Deny Jurisdiction

MEMORANDUM OPINION AND ORDER

Adopted: February 6, 1995; Released: February 8, 1995

By the Chief, Cable Services Bureau:

1. In this Order we dismiss complaints against the price Armstrong Utilities, Inc. ("Armstrong") was charging for its cable programming service ("CPS") tier on the ground that the complaints concern rates that are outside the jurisdiction and authority of this Commission.[1] As explained below, the Commission regulates rates for CPS only, and then only upon filing of a valid complaint. Our review reveals that the complaints filed against Armstrong while asserting that they challenge CPS rates, challenge only rates for basic service, not for CPS. These complaints therefore do not trigger the Commission's jurisdiction, and they are accordingly dismissed.

2. The Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act of 1992")[2] distinguishes among basic cable service, premium cable service, and cable programming service;[3] this Commission regulates rates only for cable programming service. The basic service tier includes (at a minimum) the broadcast signals distributed by the cable operator along with any public, educational, and governmental ("PEG") access channels that the local franchising authority requires the cable operator to carry. At the cable operator's discretion, this basic service tier may also include additional program services. Except in limited circumstances, the Commission does not have jurisdiction over rates for the basic service tier, and cannot act upon complaints concerning rates for that tier. Premium cable service consists of channels that are paid for individually (per-channel), such as Home Box Office ("HBO") and CineMax. Channels for which the operator charges a per-channel or per-program rate are not subject to rate regulation. CPS includes all video programming distributed over the system that is not on the basic service tier and for which the operator does not charge on a per-channel or per-program basis. Rates for CPS tiers are subject to regulation by the Commission in response to a valid complaint.

3. The filing of a complaint regarding CPS rates that is not returned by the Commission establishes our jurisdiction and triggers the operator's obligation to provide rate justification.[4] The complaints noted here were accepted for filing after preliminary review. Armstrong subsequently filed a response to the complaints stating that they concern basic, not CPS, rates. Armstrong argues that challenges against rates for basic service should be submitted to the appropriate local franchising authority rather than to the Commission.

4. The complaints under consideration here were filed with this Commission on FCC Forms 329. FCC Form 329 is used by subscribers or local franchising authorities wishing to lodge with the Commission a complaint about an operator's CPS rates. The form is entitled "Cable Programming Service Rate Complaint." While it is designed for use in challenging upper tier rates, the form itself does not explain or define basic tier, premium, or cable programming services tier, but simply uses the term cable programming services' or CPS.' It is thus possible that a complainant might complete such a complaint form, and might check the box which states that "this complaint challenges the operator's CPS rates," without actually having distinguished or understood the difference between basic tier rates, premium service rates, and CPS tier rates.[5]

5. We have examined the complaints and Armstrong's response, and we conclude that the complaints challenge only basic rates, not CPS rates. Although the complainants have checked the box indicating that the rates challenged are CPS rates, and that these rates violate the Commission's rules,[6] the specific information provided by the complainants indicates that only basic rates are actually at issue. When only basic rates are being challenged, the complaint should properly be brought to the attention of the local franchising authority in the first instance, and not filed with this Commission. If the complaints do in fact challenge CPS rates, the complainants should file a petition for reconsideration providing information adequate to support their challenge.

6. Accordingly, IT IS ORDERED, pursuant to Section 623(a)(2)(A) and (B) of the Communications Act of 1934, as amended, 47 U.S.C. §543(a)(2)(A) and (B), that the

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[1] Complaints were filed against Armstrong for the following communities: Elkton, Maryland (CUID No. MD0162); Orrville, Ohio (CUID No. OH0142); Youngstown, Ohio (CUID No. OH0188); Austintown, Ohio (CUID No. OH0603); Medina, Ohio (OH0883); and Sarver, Pennsylvania (CUID No PA2687).

[2] Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (Cable Act of 1992).

[3] Cable Act of 1992, Section 602, 47 U.S.C. §522.

[4] 47 C.F.R. § 76.956.

[5] We note that operators have great latitude in determining what channels will be included in the basic tier; once the statutory minimum (broadcast and PEG channels, as discussed above) is met, the operator may include as many additional channels in the basic tier as it wants, or it may move additional channels to a higher tier. Thus it is possible that a complainant might not clearly understand which channels are part of which tier.

[6] The form was changed in December 1993. *See* News Release of December 13, 1993. The change produced a simpler, clearer form, but even the new form does not provide definitions of or distinctions among the various service tiers. The specific assertion that the complainant is challenging CPS rates that violate the Commission's rules is question 13 on the original form; we note that this question has been eliminated on the new form.

complaints listed in Appendix A against the cable programming service price charged by Armstrong Utilities, Inc. ARE DISMISSED.

7. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

APPENDIX A

Complainant's Name	CUID No.	Date Filed
1. Cecil County Government Elkton, Maryland	MD0162	2/25/94
2. City of Orrville Orrville, Ohio	OH0142	2/25/94
3. Boardman Township Trustees Youngstown, Ohio	OH0188	10/13/93
4. Scott Burin Youngstown, Ohio	OH0188	9/17/93
5. Alice S. Courtney Youngstown, Ohio	OH0188	12/14/93
6. Austintown Township Trustees Austintown, Ohio	OH0603	10/12/93
7. Medina Township Medina, Ohio	OH0883	10/13/93
8. Edward W. Prusick Sarver, Pennsylvania	PA2687	1/27/94

Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of

Prime Cable of Hickory, L.P. CUID No. NC0175
Catawba County, North Carolina

Benchmark Filing To Support
Cable Programming Service Price

Memorandum Opinion and Order

Adopted: February 6, 1995; Released: February 8, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider a complaint about the price Prime Cable of Hickory, L. P. ("Prime Cable") was charging for its cable programming service ("CPS") tier in Catawba County, North Carolina, CUID No. NC0175. Prime Cable has attempted to justify its price through a benchmark showing on FCC Form 393. This order addresses the reasonableness of Prime Cable's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first valid CPS complaint was completed and served on Prime Cable on December 22, 1993. The Commission received the complaint on December 27, 1993.

5. Prime Cable attempted to justify its CPS price through an FCC Form 393 filed on January 21, 1994. Prime Cable amended its justification twice: first, on May 17, 1994, and then on June 27, 1994, in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally.[11]

6. As part of its January 21, 1994 filing, Prime Cable requested that the Commission dismiss the December 22, 1993 rate complaint. Prime Cable argues that the complaint should be dismissed because "the complainant did not describe the cable programming service nor provide a current rate for cable programming service."[12] Prime Cable's assertion does not persuade us that the complaint is invalid or should be dismissed. In general, we will find valid any complaint that states a claim on which relief can be granted and provides adequate information to allow us to process the complaint, despite minor flaws or inaccuracies. We believe this approach best implements the mandate of the 1992 Cable Act. Because the rates listed in answer number 8 and on the attached bill indicate that the complainant received the CPS tier, we find it reasonable to conclude that the complainant objected to the CPS tier rate. We therefore find the complaint dated December 22, 1993 valid and deny Prime Cable's request to dismiss the complaint.[13]

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Prime Cable has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Prime Cable implemented its CPS price under the new regulations. See para. 3. *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] *See Second Order on Reconsideration* at 4119; 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration* at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189, n.195.

[11] *Cable Operators' Rate Justification Filings*, DA 94-526 (released May 23, 1994).

[12] Response of Prime Cable of Hickory L.P. To A Complaint Concerning Rates In Catawba County, NC, CUID No. NC0175 at 2 (filed Jan. 21, 1994).

[13] *See Times Mirror Cable Television of Orange County, Inc. (d/b/a Dimension Cable Services), Laguna Hills, California*, CUID No. CA1085, DA 94-1341, at ¶ 6 (Cable Services Bureau released Nov. 29, 1994).

III. DISCUSSION

7. Prime Cable asserts that its monthly CPS tier price of $12.03 per subscriber is justified by its benchmark filing because its price is less than the maximum permitted charge of $12.08 as calculated in its most recent amended filing, dated June 27, 1994. Upon review, however, we have determined that Prime Cable has not correctly calculated its maximum permitted price, and it is therefore appropriate to make the following adjustment to Prime Cable's calculations in Form 393:

a. In calculating its Inflation Adjustment Factor in Form 393, Part II, Worksheets 1 and 4, Prime Cable did not rely on the most currently available data released by the U.S. Department of Commerce.[14] Rather than relying on data released by the U.S. Department of Commerce on December 1, 1993, Prime Cable relied on data released on August 31, 1993. We therefore must recalculate Prime Cable's Inflation Adjustment Factor using the most accurate data currently available for the date as to which Prime Cable filed.[15] On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 126.5 for the fourth quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through December 1993, the base date Prime Cable used in justifying its rates, of 1.034.

8. Because of this error, we conclude that Prime Cable has failed to demonstrate that its price for the CPS tier was not unreasonable. We will therefore set a price for this tier, incorporating the adjustment discussed above. This adjustment has the effect of reducing the maximum permitted monthly CPS tier price from $12.08 (as Prime Cable calculated in its June 27, 1994 filing) to $11.98.

IV. CONCLUSIONS

9. Upon review of the record herein, we conclude that Prime Cable's showing supports a maximum reasonable CPS tier price of $11.98 per month (plus franchise fee) for the period December 27, 1993 to May 14, 1994.[16] However, we further determine that the refund at issue is such a de minimis amount that it would not serve the public interest to order a refund.

10. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the request of Prime Cable of Hickory, L.P. to dismiss the December 22, 1993 complaint against its cable programming service price charged in Catawba County, North Carolina, CUID No. NC0175, IS DENIED.

11. IT IS FURTHER ORDERED, that the December 22, 1993 complaint against the cable programming service price charged by Prime Cable of Hickory, L.P. in Catawba County, North Carolina, CUID No. NC0175, IS GRANTED TO THE EXTENT INDICATED HEREIN AND DENIED TO THE EXTENT INDICATED HEREIN.

12. IT IS FURTHER ORDERED, that the benchmark filing submitted by Prime Cable of Hickory, L.P. with respect to Catawba County, North Carolina, CUID No. NC0175, for the period of December 27, 1993 to May 14, 1994, justifies a maximum price of $11.98 per month (plus franchise fee) for the cable programming service tier.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[14] *See Cable Television Rate Regulation: Questions and Answers Relating to FCC Form 393*, Q and A No. 10 (released July 30, 1993) ("The most recent (as of the completion date of the form) GNP-PI numbers available to the public should be used").

[15] *See* 47 C.F.R. § 76.922(b)(9)(iii)(if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[16] This finding is based solely on the representations of Prime Cable listed in paragraph 5, *supra*, and the modifications described in paragraph 7, *supra*. Should information come to our attention that these representations were inaccurate in any material way, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:

TCI Cablevision of West Michigan, Inc.	CUID Nos. MI0225, MI0231, MI0232 and MI1469
City of Big Rapids, Michigan	
Green Charter Township, Michigan	
Big Rapids Charter Township, Michigan	
Township of Mecosta, Michigan	

Order Denying Jurisdiction

MEMORANDUM OPINION AND ORDER

Adopted: February 6, 1995; Released: February 8, 1995

By the Chief, Cable Services Bureau:

1. In this Order we dismiss complaints against the price TCI Cablevision of West Michigan, Inc. ("TCI") was charging for its cable programming service ("CPS") tier on the ground that the complaints concern rates that are outside the jurisdiction and authority of this Commission.[1] As explained below, the Commission regulates rates for CPS only, and then only upon filing of a valid complaint. Our review reveals that the complaints filed against TCI, while asserting that they challenge CPS rates, challenge only rates for basic service, not for CPS. These complaints therefore do not trigger the Commission's jurisdiction, and they are accordingly dismissed.

2. The Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act of 1992")[2] distinguishes among basic cable service, premium cable service, and cable programming service;[3] this Commission regulates rates only for cable programming service. The basic service tier includes (at a minimum) the broadcast signals distributed by the cable operator along with any public, educational, and governmental ("PEG") access channels that the local franchising authority requires the cable operator to carry. At the cable operator's discretion, this basic service tier may also include additional program services. Except in limited circumstances, the Commission does not have jurisdiction over rates for the basic service tier, and cannot act upon complaints concerning rates for that tier. Premium cable service consists of channels that are paid for individually (per-channel), such as Home Box Office ("HBO") and CineMax. Channels for which the operator charges a per-channel or per-program rate are not subject to rate regulation. CPS includes all video programming distributed over the system that is not on the basic service tier and for which the operator does not charge on a per-channel or per-program basis. Rates for CPS tiers are subject to regulation by the Commission in response to a valid complaint.

3. The filing of a complaint regarding CPS rates that is not returned by the Commission establishes our jurisdiction, and triggers the operator's obligation to provide rate justification.[4] The complaints noted here were accepted for filing after preliminary review. TCI subsequently filed a response to the complaints indicating that the complaints concern basic, not CPS, rates. Specifically, TCI's rate justifications and rate cards for these four communities indicate that as of September 1, 1993, TCI only offered a basic service tier.

4. The complaints under consideration here were filed with this Commission on FCC Forms 329. FCC Form 329 is used by subscribers or local franchising authorities wishing to lodge with the Commission a complaint about an operator's CPS rates. The form is entitled "Cable Programming Service Rate Complaint." While it is designed for use in challenging upper tier rates, the form itself does not explain or define basic tier, premium, or cable programming services tier, but simply uses the term cable programming services' or 'CPS.' It is thus possible that a complainant might complete such a complaint form, and might check the box which states that "this complaint challenges the operator's CPS rates," without actually having distinguished or understood the difference between basic tier rates, premium service rates, and CPS tier rates.[5]

5. We have examined the complaints and TCI's response, and we conclude that the complaints challenge only basic rates, not CPS rates. Although the complainants have checked the box indicating that the rates challenged are CPS rates, and that these rates violate the Commission's rules, [6] the specific information provided by the complainants indicates that only basic rates are actually at issue. When only basic rates are being challenged, the complaint should properly be brought to the attention of the local franchising authority in the first instance, and not filed with this Commission. If the complaints do in fact challenge CPS rates, the complainants may file petitions for reconsideration providing information adequate to support their challenge.

6. Accordingly, IT IS ORDERED, pursuant to Section 623(a)(2)(A) and (B) of the Communications Act of 1934, as amended, 47 U.S.C. §543(a)(2)(A) and (B), that the

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[1] Specifically, this Order addresses complaints filed against TCI for the following communities: City of Big Rapids, Michigan, CUID No. MI0225; Green Charter Township, Michigan, CUID No. MI0231; Big Rapids Charter Township, Michigan, CUID No. MI0232; and Township of Mecosta, Michigan, CUID No. MI1469.

[2] Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (Cable Act of 1992).

[3] Cable Act of 1992, Section 602, 47 U.S.C. § 522.

[4] 47 C.F.R. § 76.956.

[5] We note that operators have great latitude in determining what channels will be included in the basic tier; once the statutory minimum (broadcast and PEG channels, as discussed above) is met, the operator may include as many additional channels in the basic tier as it wants, or it may move additional channels to a higher tier. Thus it is possible that a complainant might not clearly understand which channels are part of which tier.

[6] The form was changed in December 1993. *See* News Release of December 13, 1993. The change produced a simpler, clearer form, but even the new form does not provide definitions of or distinctions among the various service tiers. The specific assertion that the complainant is challenging CPS rates that violate the Commission's rules is question 13 on the original form; we note that this question has been eliminated on the new form.

complaints listed in Appendix A against the cable programming service price charged by TCI Cablevision of West Michigan, Inc. ARE DISMISSED.

7. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

APPENDIX A

Complainant's Name	CUID No.	Date Filed
1. City of Big Rapids Big Rapids, Michigan	MI0225	10/4/93
2. Green Charter Township Paris, Michigan	MI0231	11/24/93
3. Big Rapids Charter Township Big Rapids, Michigan	MI0232	11/8/93
4. Township of Mecosta Standwood, Michigan	MI1469	11/1/93

Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of

Time Warner Cable — CUID No. IL0021
Danville, Illinois

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: February 6, 1995; Released: February 8, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the price Time Warner Cable ("Time Warner") was charging for its cable programming service ("CPS") tier in Danville, Illinois, CUID No. IL0021. Time Warner has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This order addresses the reasonableness of Time Warner's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first complete and timely CPS complaint was served on Time Warner on February 24, 1994.[11] The Commission received the complaint on the same date.

5. Time Warner attempted to justify its CPS price through an FCC Form 393 filed on March 15, 1994. Time Warner amended its justification on June 21, 1994 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally.[12]

III. DISCUSSION

6. Time Warner asserts that its monthly CPS tier price of $11.05 per subscriber is justified by its benchmark filing because its price is less than the maximum permitted charge of $11.08 as calculated in the filing. Upon review of Time Warner's Form 393, we have found no apparent errors that would result in Time Warner's CPS tier price exceeding its maximum permitted price.

IV. CONCLUSIONS

7. Upon review of the record herein, we conclude that Time Warner's showing supports a CPS tier price of $11.05 per month (plus franchise fee) for the period of February 24, 1994 to May 14, 1994.[13]

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Time Warner has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) ("*Second Order on Reconsideration*"), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Time Warner implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] *Second Order on Reconsideration* at 4119; 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration* at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189, n.195.

[11] The complaint was dated February 24, 1994 and states that it was mailed to Time Warner on that date. Time Warner has not complied with 47 C.F.R. § 76.956(a), which requires it to state when service occurred. Under these circumstances we will consider February 24, 1994 as the service date.

[12] *Cable Operators' Rate Justification Filings*, DA 94-526 (released May 23, 1994).

[13] This finding is based solely on the representations of Time Warner listed in paragraph 5. Should information come to our attention that these representations (including representations as to data regarding installations and customer equipment) were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

8. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the February 24, 1994 complaint against the cable programming service price charged by Time Warner Cable in Danville, Illinois, CUID No. IL0021, and all other complaints relating to the same price, ARE DENIED TO THE EXTENT INDICATED HEREIN.

9. IT IS FURTHER ORDERED, that the benchmark filing submitted by Time Warner Cable with respect to CUID No. IL0021, for the period of February 24, 1994 to May 14, 1994, justifies a price of $11.05 per month (plus franchise fee) for Time Warner Cable's cable programming service tier.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of

Time Warner Cable CUID No. IL0006
DeKalb, Illinois

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: February 6, 1995; Released: February 8, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the price Time Warner Cable ("Time Warner") was charging for its cable programming service ("CPS") tier in DeKalb, Illinois, CUID No. IL0006. Time Warner has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This order addresses the reasonableness of Time Warner's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first complete and timely CPS complaint was served on Time Warner on February 28, 1994.[11] The Commission received the complaint on the same date.

5. Time Warner attempted to justify its CPS price through an FCC Form 393 filed on March 18, 1994. Time Warner amended its justification on June 22, 1994 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally.[12]

III. DISCUSSION

6. Time Warner asserts that its monthly CPS tier price of $11.56 per subscriber is justified by its benchmark filing because its price is less than the maximum permitted charge of $11.57 as calculated in the filing. Upon review of Time Warner's Form 393, we have found no apparent errors that would result in Time Warner's CPS tier price exceeding its maximum permitted price.

IV. CONCLUSIONS

7. Upon review of the record herein, we conclude that Time Warner's showing supports a CPS tier price of $11.56 per month (plus franchise fee) for the period of February 28, 1994 to May 14, 1994.[13]

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Time Warner has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Time Warner implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] *Second Order on Reconsideration* at 4119; 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration* at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189, n.195.

[11] The complaint was dated February 28, 1994 and states that it was mailed to Time Warner on that date. Time Warner has not complied with 47 C.F.R. § 76.956(a), which requires it to state when service occurred. Under these circumstances we will consider February 28, 1994 as the service date.

[12] *Cable Operators' Rate Justification Filings*, DA 94-526 (released May 23, 1994).

[13] This finding is based solely on the representations of Time Warner listed in paragraph 5. Should information come to our attention that these representations (including representations as to data regarding installations and customer equipment) were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

8. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the February 28, 1994 complaint against the cable programming service price charged by Time Warner Cable in DeKalb, IL., CUID No. IL0006, and all other complaints relating to the same price, ARE DENIED TO THE EXTENT INDICATED HEREIN.

9. IT IS FURTHER ORDERED, that the benchmark filing submitted by Time Warner Cable with respect to CUID No. IL0006, for the period of February 28, 1994 to May 14, 1994, justifies a price of $11.56 per month (plus franchise fee) for Time Warner Cable's cable programming service tier.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of

Time Warner Cable — CUID No. FL0027
Inverness, Florida

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: February 6, 1995; Released: February 8, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the price Time Warner Cable ("Time Warner") was charging for its cable programming service ("CPS") tier in Inverness, Florida, CUID No. FL0027. Time Warner has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This order addresses the reasonableness of Time Warner's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993. [6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first complete and timely CPS complaint was served on Time Warner on September 13, 1993.[11] The Commission received the complaint on September 24, 1993.

5. Time Warner attempted to justify its CPS price through an FCC Form 393 filed on November 16, 1993. Time Warner amended its justification on June 23, 1994 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally.[12]

III. DISCUSSIONS

6. Time Warner asserts that its monthly CPS tier price of $10.64 per subscriber is justified by its benchmark filing because its price is less than the maximum permitted charge of $10.77 as calculated in the filing. Upon review of Time Warner's Form 393, we have found no apparent errors that would result in Time Warner's CPS tier price exceeding its maximum permitted price.

IV. CONCLUSIONS

7. Upon review of the record herein, we conclude that Time Warner's showing supports a CPS tier price of $10.64 per month (plus franchise fee) for the period of September 24, 1993 to May 14, 1994 in CUID No. FL0027.[13]

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Time Warner has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Time Warner implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] *Second Order on Reconsideration* at 4119; 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration* at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189, n.195.

[11] The complaint was dated September 13, 1993and states that it was mailed to Time Warner on that date. Time Warner has not complied with 47 C.F.R. § 76.956(a), which requires it to state when service occurred. Under these circumstances we will consider September 13, 1993 as the service date.

[12] *Cable Operators' Rate Justification Filings*, DA 94-526 (released May 23, 1994).

[13] This finding is based solely on the representations of Time Warner listed in paragraph 5, *supra*. Should information come to our attention that these representations (including representations as to data regarding installations and customer equipment) were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

8. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the September 13, 1993 complaint against the cable programming service price charged by Time Warner Cable in Inverness, Florida, CUID No. FL0027, and all other complaints relating to the same price, ARE DENIED TO THE EXTENT INDICATED HEREIN.

9. IT IS FURTHER ORDERED, that the benchmark filing submitted by Time Warner Cable with respect to CUID No. FL0027, for the period of September 24, 1994 to May 14, 1994, justifies a price of $10.64 per month (plus franchise fee) for Time Warner Cable's cable programming service tier.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of

Rifkin Narragansett	CUID Nos. FL0406, FL0407,
South Florida CATV	FL0409, FL0410, FL0411,
d.b.a Gold Coast CableVision	FL0412, and FL0413

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: February 6, 1995; Released: February 8, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the price Rifkin Narragansett South Florida CATV d.b.a Gold Coast CableVision ("Rifkin") was charging for its cable programming service ("CPS") tier in Miami Beach; Florida, CUID No. FL0406; Bay Harbor Islands, Florida, CUID No. FL0407; North Bay Village, Florida, CUID No. FL0409; Surfside, Florida, CUID No. FL0410; Bal Harbour Village, Florida, CUID No. FL0411, Golden Beach, Florida, CUID No. FL0412; and Dade County, Florida, CUID No. FL0413. Rifkin has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This order addresses the reasonableness of Rifkin's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first complete and timely CPS complaints were served on Rifkin on September 17, 1993 for all of the abovementioned CUID numbers.[11] The Commission received the complaints on September 27, 1993.

5. Rifkin attempted to justify its CPS price through substantially identical FCC Form 393s filed on November 15, 1993. Rifkin amended its justifications on June 23, 1994 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally.[12]

III. DISCUSSION

6. Rifkin asserts that its monthly CPS tier price of $13.03 per subscriber is justified by its benchmark filings because its price is less than the maximum permitted charge of $13.05 as calculated in the filings. Upon review of Rifkin's Form 393, we have found no apparent errors that would result in Rifkin's CPS tier price exceeding its maximum permitted price.

IV. CONCLUSIONS

7. Upon review of the record herein, we conclude that Rifkin's showing supports a maximum reasonable CPS tier price of $13.03 per month (plus franchise fee) for the period of September 27, 1993 to May 14, 1994 in Miami Beach Florida, CUID No. FL0406; Bay Harbor Islands,

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Rifkin has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Rifkin implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] *Second Order on Reconsideration* at 4119; 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration* at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189, n.195.

[11] The complaints were dated September 17, 1993 and state that they were mailed to Rifken on that date. Rifkin has not complied with 47 C.F.R. § 76.956(a), which requires it to state when service occurred. Under these circumstances we will consider of September 17, 1993 as the service date for all of the complaints.

[12] *Cable Operators' Rate Justification Filings*, DA 94-526 (released May 23, 1994).

Florida, CUID No. FL0407; North Bay Village, Florida, CUID No. FL0409; Surfside, Florida, CUID No. FL0410; Bal Harbour Village, Florida, CUID No. FL0411; Golden Beach, Florida, CUID No. FL0412; and Dade County, Florida, CUID No. FL0413.[13]

8. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints against the cable programming service price charged by Rifkin, in Miami Beach, Florida, CUID No. FL0406; Bay Harbor Islands, Florida, CUID No. FL0407; North Bay Village, Florida, CUID No. FL0409; Surfside, Florida, CUID No. FL0410; Bal Harbour Village, Florida, CUID No. FL0411; Golden Beach, Florida, CUID No. FL0412; and Dade County, Florida, CUID No. FL0413; ARE DENIED TO THE EXTENT INDICATED HEREIN.

9. IT IS FURTHER ORDERED, that the benchmark filings submitted by Rifkin with respect to CUID Nos. FL0406, FL0407, FL0409, FL0410, FL0411, FL0412, and FL0413, for the period of September 27, 1993 to May 14, 1994, justify a maximum price of $13.03 (plus franchise fee) for Rifkin's cable programming service tier.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[13] This finding is based solely on the representations of Rifkin listed in paragraph 5, *supra*. Should information come to our attention that these representations (including representations as to data regarding installations and customer equipment) were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:

PARAGON CABLE

Appeal of Local
Rate Order of City of
Grapevine, Texas

ORDER

Adopted: February 7, 1995; Released: February 8, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On August 5, 1994, Paragon Cable ("Paragon") filed with the Commission a Petition for Review of Rate Order ("appeal") of the local rate order ("local order") adopted by the City of Grapevine, Texas ("the City"). Paragon also filed a Petition for Stay of Enforcement of Rate Order on August 15, 1994. Paragon's Petition for Stay of the local order was granted pending the resolution of this appeal.[1] In its local order, the City established Paragon's rates for basic cable service, equipment, installations and hourly service charges.[2] As part of this decision setting the basic tier rates, the City found Paragon's collective or package offering of certain individually offered ("a la carte") channels to be a regulated tier of service, and, therefore, included those channels as regulated channels for purposes of the local order. The City ordered Paragon to make refunds to subscribers for all payments made in excess of the rates set forth in the local order for the period September 1, 1993 through July 14, 1994.[3]

2. In its appeal, Paragon challenges the local order on three grounds. First, Paragon argues that the City exceeded its authority in determining that its a la carte services should be treated as regulated channels. Second, it argues that the City's decision to treat the a la carte package as a regulated tier of service is contrary to the objectives of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") and the Commission's a la carte rules. Third, Paragon contends that it was cooperative with the city's rate consultant and that the allegation that it was not should not serve as a basis for concluding that its a la carte offering should be rate regulated. The City responds that it validly exercised the authority to evaluate the a la carte offerings delegated to it by the Commission and that it properly applied the Commission's guidelines on a la carte packages and concluded that Paragon's package should be treated as a regulated tier.

3. Under our rules, rate orders made by local franchising authorities may be appealed to the Commission.[4] In ruling on appeals of local rate orders, the Commission will not conduct a *de novo* review, but instead will sustain the franchising authority's decision as long as there is a reasonable basis for that decision. Therefore, the Commission will reverse a franchising authority's decision only if it determines that the franchising authority acted unreasonably in applying the Commission's rules in rendering its local rate order. If the Commission reverses a franchising authority's decision, it will not substitute its own decision but instead will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission's decision on appeal. With respect to a determination made by a franchising authority on the regulatory status of an a la carte package as part of its final decision setting rates for the basic service tier, the Commission has stated that "the Commission will defer to the local authority's findings of fact if there is a reasonable basis for the local findings," and the Commission "will then apply FCC rules and precedent to those facts to determine the appropriate regulatory status of the [a la carte package] in question."[5]

II. DISCUSSION

4. Paragon objects to the City's finding in the local rate order that its a la carte services (WGN and WTBS) must be included in the regulated channel count for the purpose of calculating benchmark rates.[6] Paragon argues that its a la carte package complies with the provisions of the 1992 Cable Act, which it contends encourage cable operators to unbundle programming services from regulated tiers and offer them on a per-channel basis.[7] Paragon further argues that its a la carte package fully complies with Commission rules for unregulated treatment existing at the time the package was created.[8]

5. The Paragon a la carte services at issue were first offered to subscribers on September 1, 1993, when Paragon restructured the service offerings on its Grapevine system. Paragon states that its September 1, 1993, restructuring

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[1] *Order*, DA 94-1072 (Cab. Serv. Bur., released Sept. 30, 1994.) Other filings in this proceeding include the City of Grapevine's Response to Paragon Cable's Petition for Review of Rate Order and Petition for Stay of Enforcement of Rate Order filed on September 14, 1994 and a Reply filed by Paragon on September 22, 1994.

[2] *See* Appeal, Exhibit A, Ordinance No. 94-52, City of Grapevine, Texas, dated July 5, 1994.

[3] Under the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992), Communications Act of 1934, § 623(b), 47 U.S.C. § 543(b), and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment.

[4] 47 C.F.R. § 76.944.

[5] Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, 9 FCC Rcd 4119, 4217 (1994) (*"Second Reconsideration Order"*) .

[6] Appeal at Exhibits A and B.

[7] *Id.* at 6.

[8] *Id.* at 8 and 9. *See Rate Order*, 8 FCC Rcd at 5836-5838; Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: First Order on Reconsideration, MM Docket 92-266, 9 FCC Rcd 1164, 1184 (1993); *Second Reconsideration Order*, 9 FCC Rcd at 4213.

involved moving two channels, WGN and WTBS, off the basic service tier and offering the two channels on an individual basis and also as a package that Paragon alleges is not subject to rate regulation.

6. The facts presented in this appeal closely resemble the facts presented in one of our recently issued letter of inquiry orders on a la carte packages, *Paragon Cable*, Irving, Texas, LOI-93-25, DA 94-1315 (Cab. Serv. Bur., released Nov. 25, 1994) (*"Paragon of Irving"*), in which we resolved the regulatory status of an la carte package offered by Paragon on its Irving, Texas, system that is essentially the same as the a la carte package at issue in this appeal. Specifically, the a la carte package at issue in the *Paragon of Irving* order was a two channel package, made up of channels formerly available on the basic service tier, which was offered as part of a restructuring. In that case, we found we could not say that it was clear that the a la carte package at issue was not a permissible non-rate regulated offering under our rules. We further concluded that in light of the prior confusion over what constituted a permissible non-rate regulated a la carte offering, it would be inequitable to subject the operator to refund liability or to require the operator to restructure its tiers so as to return the channels offered in the a la carte package to regulated tiers. Instead, we found that the a la carte package at issue may be treated as a new product tier under the Commission's *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Sixth Order on Reconsideration and Fifth Report and Order*, MM Docket Nos. 92-266 and 93-215, FCC 94-286 (released November 18, 1994) (*"Going Forward Order"*).[9]

7. We find that the City's determination that Paragon's a la carte package is a regulated tier is inconsistent with the action taken in the letter of inquiry orders, and in particular, in *Paragon of Irving*. We further find that, in accordance with *Paragon of Irving*, Paragon's a la carte package should not be treated as a rate regulated tier of service. Accordingly, we are remanding this issue to the Cities so that they can enter orders consistent with our findings in *Paragon of Irving*.[10]

III. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED that the appeal of the local order, with respect to the issue of the regulatory status of Paragon's a la carte package, is REMANDED to the City for resolution in accordance with the terms of this Order.

9. IT IS FURTHER ORDERED that our stay of the local order which was granted pending the resolution of this appeal is hereby VACATED.

10. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[9] New product tiers are cable programming services that, subject to certain conditions, are not rate regulated. *Going Forward Order* at ¶ ¶ 16-37. In the *Going Forward Order*, the Commission reconsidered its regulatory treatment of collective offerings of a la carte channels. Specifically, the Commission determined that such packages are cable programming service tiers within the meaning of Section 3(1)(2) of the 1992 Cable Act and therefore will be subject to our general rate regulation rules. *Id.* at ¶ 51. However, the Commission also stated that with respect to packages created between April 1, 1993, and September 30, 1994, where it is not clear that a particular package was not a permissible offering under the a la carte rules in effect at the time it was created, the package may be treated as a new product tier. *Id.*

[10] Paragon's argument that the City has no authority to determine the regulatory status of a la carte service offerings is without merit. The City's rate order was adopted on July 5, 1994. In the *Second Reconsideration Order*, effective May 15, 1994, the Commission provided that "local authorities may make any necessary 'a la carte' determination as part of their final decision setting rates for the basic tier. *Second Reconsideration Order*, 9 FCC Rcd at 4217. Contrary to Paragon's contention, this provision does not delegate the Commission's jurisdiction over cable programming service tier rates to local authorities. Rather, it allows local authorities to make a determination concerning the number of regulated channels that is necessary to accomplish their review of basic service tier rates.

We need not address Paragon's argument that the consultant improperly charged that Paragon was uncooperative in the rate proceeding in light of the fact that we grant Paragon's appeal on the a la carte issue and remand this case to the City.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Fred W. Daniel d/b/a
Orion Telecom
Complainant,

v.

Pacific Bell
Defendant.

File No. E-95-3

ORDER

Adopted: February 23, 1995; Released: March 2, 1995

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On November 8, 1994, Fred W. Daniel d/b/a Orion Telecom (Orion) filed the above-captioned formal complaint (complaint) against Pacific Bell. The complainant alleged that Pacific Bell had violated Section 202(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 202(a). On February 2, 1995, Orion filed a *Request for Dismissal of Complaint*, stating that a mutually agreeable settlement had been reached.[1]

2. We are satisfied that granting Orion's request to dismiss the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of the Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated in Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the *Request for Dismissal of Complaint* IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and that the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Enforcement Division
Common Carrier Bureau

[1] *See also* Letter from Nancy Woolf, counsel for Pacific Bell, to Dennis C. Brown, counsel for Orion, dated January 11, 1995.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-29

In the Matter of

Amendment of Section 73.202(b), RM-8596
Table of Allotments,
FM Broadcast Stations.
(Iron Mountain, Michigan)

NOTICE OF PROPOSED RULE MAKING

Adopted: February 21, 1995; Released: March 2, 1995

Comment Date: April 24, 1995
Reply Comment Date: May 9, 1995

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Superior Media Group, Inc. ("petitioner"), seeking the allotment of Channel 294A to Iron Mountain, Michigan, as that community's third FM broadcast service. Petitioner submitted information in support of the proposal and stated its intention to file an application for Channel 294A if the channel is allotted to Iron Mountain.

2. We believe petitioner's proposal warrants consideration. Channel 294A can be allotted to Iron Mountain, Michigan, in compliance with the Commission's minimum distance separation requirements of the Commission's rules without a site restriction.[1] Since Iron Mountain is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government will be obtained for this allotment.

3. In view of the fact that the proposed allotment would provide a third local FM broadcast service to Iron Mountain, Michigan, the Commission believes it would serve the public interest to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's rules, for the community listed below, to read as follows:

	Channel No.	
Community	Present	Proposed
Iron Mountain, Michigan	226C1, 268C1	226C1, 268C1, 294A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **April 24, 1995,** and reply comments on or before **May 9, 1995,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Matthew H. McCormick
Reddy, Begley, Martin & McCormick
1001 22nd Street, N.W., Suite 350
Washington, D.C. 20037

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 294A at Iron Mountain are 45-49-12 and 88-04-06.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1),303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-28

In the Matter of

Amendment of Section 73.202(b) RM-8593
Table of Allotments,
FM Broadcast Stations.
(Stamping Ground, Kentucky)

NOTICE OF PROPOSED RULE MAKING

Adopted: February 21, 1995; Released: March 3, 1995

Comment Date: April 24, 1995
Reply Comment Date: May 10, 1995

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Scott County Broadcasting, Inc., ("petitioner"), permittee of Station WKYI(FM), Channel 256A, Stamping Ground, Kentucky, proposing the substitution of Channel 241A for Channel 256A at Stamping Ground to enable Station WKYI(FM) to increase its power to six kilowatts and to eliminate interference within its protected contour.[1] Additionally, petitioner seeks the modification of Station WKYI(FM)'s construction permit to specify operation on Channel 241A in lieu of Channel 256A at Stamping Ground. Petitioner submits information in support of the proposal and states its intention to apply for the channel, if allotted.[2]

2. We believe the public interest would be served by proposing the substitution of Channel 241A for Channel 256A at Stamping Ground, Kentucky, since it would enable Station WKYI(FM) to provide the community with an improved FM service. An engineering analysis has determined that Channel 241A can be allotted at Stamping Ground in compliance with the Commission's minimum distance separation requirements at petitioner's requested site with a site restriction of 12.0 kilometers (7.5 miles) east to avoid short-spacings to the allotment and application site for Channel 242C3 at Stanford, Kentucky, and Station WKID(FM), Channel 240A, Vevay, Indiana[3]

3. As requested, we also propose to modify petitioner's construction permit for Station WKYI(FM) to specify operation on Channel 241A. In addition, we will not accept competing expressions of interest for the use of Channel 241A at Stamping Ground because the procedures outlined in *Modification of FM and TV Licenses,* 98 FCC 2d 916 (1984) and Section 1.420(g) of the Commission's Rules do not apply in this case since no upgrade in facilities is contemplated.[4]

4. Accordingly, we will seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Stamping Ground, Kentucky	256A	241A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **April 24, 1995,** and reply comments on or before **May 10, 1995,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

James P. Gray, President
Scott County Broadcasting, Inc.
10 Trinity Place
Fort Thomas, Kentucky 41075
(Petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the*

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[1] Petitioner also proposes the substitution of Channel 257C3 for Channel 257A at Harrodsburg, Kentucky, to enable Station WHBN(FM) to increase its power to 25 kilowatts as a Class C3 facility and expand its service area. However, we will not propose this upgrade because the licensee of Station WHBN(FM) is not a joint petitioner and has not requested such an upgrade.

[2] Although the petitioner's request was signed, it failed to include an affidavit verifying that the statements contained in the petition were accurate to the best of its knowledge. Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission by a party not represented by counsel be signed and verified by the party and his/her address stated. In the absence of such verification, the petition may be dismissed. Section 1.401(b) of the Commission's Rules concerning rule making proceedings places petitioners on notice that their proposal must conform with the requirements of Section 1.52 regarding subscription and verification. *See also Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes,* 5 FCC Rcd 3911, 3919 n.41 (1990). The petitioner is requested to rectify this omission in its comments.

[3] The coordinates for Channel 241A at Stamping Ground are North Latitude 38-17-43 and West Longitude 84-33-10.

[4] The Commission considers channels of the same class to be equivalent unless showings have been made that a station cannot be constructed for reasons such as environmental consequences or air hazards. *See Vero Beach, Florida,* 3 FCC Rcd 1049 (1988), *rev. denied,* 4 FCC Rcd 2184, 2185 (1989).

Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1),303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-30

In the Matter of

Amendment of Section 73.202(b), RM-8599
Table of Allotments,
FM Broadcast Stations.
(Harwood, North Dakota)

NOTICE OF PROPOSED RULE MAKING

Adopted: February 21, 1995; Released: March 3, 1995

Comment Date: April 24, 1995
Reply Comment Date: May 10, 1995

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Conway Broadcasting ("petitioner") requesting the allotment of Channel 264C3 to Harwood, North Dakota, as its first local FM service. Petitioner states that it will apply for the channel, if allotted.

2. Channel 264C3 can be allotted to Harwood in compliance with the Commission's minimum distance separation requirements with a site restriction of 14.7 kilometers (9.1 miles) southwest to avoid a short-spacing to Station KIKV-FM, Channel 264C1, Alexandria, Minnesota.[1] Canadian concurrence in this allotment is required because Harwood is located within 320 kilometers of the U.S.-Canadian border.

3. We believe the public interest would be served by proposing the allotment of Channel 264C3 to Harwood since an interest has been expressed in providing the community with its first local aural broadcast service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Harwood, North Dakota	---	264C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **April 24, 1995,** and reply comments on or before **May 10, 1995,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Lars Conway
Conway Broadcasting
4415 Fremont Avenue, South
Minneapolis, MN 55409
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 264C3 at Harwood are 47-05-00 North Latitude and 97-00-00 West Longitude.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1),303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

BILL CORRECTORS, INC. AND,
APOLLO SYSTEMS, INC.,
Complainants,

v.

PACIFIC BELL, File No. E-92-100
Defendant.

MEMORANDUM OPINION AND ORDER

Adopted: February 21, 1995; Released: March 3, 1995

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. We have before us a complaint filed by Bill Correctors, Inc. and Apollo Systems, Inc. (together "Complainants")[1] against Pacific Bell ("Pacific"). Complainants contend that Pacific has violated Sections 201(b) and 202(a) of the Communications Act, 47 U.S.C. §§ 201(b) and 202(a), by improperly applying an End User Common Line (EUCL)[2] charge on certain foreign exchange (FX) lines used by Pacific to connect a Centrex[3] serving office to a Class 5 central office serving certain end user customers on whose behalf Complainants filed the instant complaints. Complainants contend that the charge was in addition to the normal EUCL charge assessed for the local loop between an end users' premises and a Class 5 central office.[4] Complainants seek an order directing Pacific to cease and desist assessing Complainants' customers for the wrongful EUCL charge.[5] Pacific has denied the allegations and has moved to dismiss the complaint. As discussed below, we will grant the complaint in part and deny it in part.

II. PROCEDURAL ISSUES

A. Standing To Bring Action

1. Contentions

2. Pacific contends that Complainants are not the real parties in interest and, therefore, do not have standing to file the subject complaint.[6] Pacific argues that Complainants have not established that the customers on whose behalf Complainants filed claims understood or intended that a complaint would be filed with the Commission. Pacific asserts that the letters confirming contractual relationships submitted by Complainants are not assignments or powers of attorney but simply letters of agency.[7] It contends that the "agency evidenced in the letters is quite limited and does not authorize representation in legal proceedings."[8]

3. In addition, Pacific points out that nine of the customer letters submitted by Complainants as evidence of authority to file the complaints[9] appoint a communications consultant other than the Complainants to address issues pertaining to the disputed EUCL charges. Pacific contends that these letters generally authorize the communications

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[1] The complaint was originally filed by Bill Correctors, Inc., Delphi Associates (now known as Apollo Research Systems), and San Francisco Research Group, all communications consultant companies, on behalf of various end-user customers of Pacific's services. Pacific filed a motion to dismiss the original complaint on the grounds that: (1) Complainants lacked standing; (2) the complaint was a class action that could not be properly filed with the Commission; and (3) all or portions of the Complainants' damages claims were barred by the two year statute of limitations contained in Section 415 of the Communications Act, 47 U.S.C. § 415. Complainants subsequently amended the complaint to: (1) include claims by specific end-user customers; (2) allege facts demonstrating that they had standing to file the complaint ; and (3) withdraw claims for damages that Complainants and Pacific agreed had been extinguished by the statute of limitations.

[2] A EUCL charge is a charge which places the burden of paying for the basic access line, or loop, on the end users of the service. See, *e.g.*, Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145 Phase I, 97 FCC 2d 1082, 1207 (1984).

[3] This service is defined in Pacific Bell's Tariff F.C.C. No. 128, Section 4.6(c). Centrex service is similar to a Private Branch Exchange (PBX) switchboard except that all the switching equipment is located on the telephone company's premises rather than that of the subscriber. The telephone instruments on the customer's premises are linked to the switching equipment on the telephone company's premises by individual loops.

[4] Normally, a customer's premises is connected to the telephone network by means of a transmission line, a loop, connected to the nearest Class 5 or end office. Since this is the switching office that normally provides dial tone to the customer, it is known as the serving central office. In the instant case, however, complainants' clients, although located in Los Angeles County and served by end offices in that county, chose to obtain Centrex service from an end office located in Orange County because Centrex service rates there were lower. To enable Complainants' clients to do this, the telephone company provides foreign exchange (FX) service which, in this case, connects the customers located in Los Angeles county to Class 5 offices in Orange County. Pacific charged Complainants' clients one EUCL charge for the local loops between the nearest Class 5 central office and the end user's premises and an additional EUCL charge for each FX line that was used to bring the Centrex service from Orange County to customers otherwise served by the Los Angeles County Class 5 serving central office. *See* Complaint, Attachment 1, for a diagram of the configuration at issue.

[5] Complainants also asked the Commission to award attorney's fees. Such a request, however, is beyond the authority of the Commission and, therefore, is denied. *See* Allnet v. Bell Atlantic, 8 FCC Rcd 1347 (1993); *see also Green County Planning Board v. FPC*, 455 F.2d 412 (2d Cir. 1972).

[6] Answer to Amended Complaint at 2.

[7] *Id.*

[8] *Id.* at 3-4.

[9] These include: Bank of America, Blue Cross, City of Los Angeles, County of Los Angeles, First Nationwide Bank, Security Pacific Automation Company, Southern California Gas Company, University Communication Network, and Wells Fargo Bank.

consultant to obtain records, review and make inquiries concerning billing information, negotiate adjustments for incorrect billings or overcharges and receive refund checks and do not evidence an intention to authorize the consultant either to file a complaint with the Commission or to assign that right to the Complainants.[10] Pacific argues that the complaint should be dismissed because it include claims on behalf of the customers who did not authorize Complainants to pursue claims on their behalf.[11]

4. Finally, Pacific asserts that the lack of authorization in the letters submitted as evidence by Complainants places it in an untenable position because it would not be shielded from later lawsuits filed by the customers in their own names. This, according to Pacific, is the problem the real party in interest rule is designed to prevent. Therefore, Pacific argues, the Commission should dismiss the complaint to the extent it was filed by consultants who are not the real parties in interest.

5. In responsive pleadings, Complainants contend that Pacific is asking the Commission to impose a standard of agency that goes beyond what is required by the Commission's rules and the Communications Act. They point out that Section 208 of the Act[12] permits any person to bring a complaint to the Commission and provides that no complaint shall be dismissed because there was no direct damage to the complainant. Complainants maintain that the letters of agency they submitted with the complaint clearly establish that the authority conveyed by the letters is "expansive rather than limiting."[13] They point to the letter written by Access America Telemanagement, which authorizes Delphi Associates to pursue the EUCL charge issue "until it is resolved to [American Telemanagement's] satisfaction."[14] Complainants argue that Pacific is attempting to distract and confuse the issue by asserting that Complainants must be attorneys-in-fact to bring this action.

6. Complainants further state that any danger that Pacific might be subject to future suits by the same customers can be eliminated by structuring the damages award to preclude double or duplicate claims. Complainants contend that the complaint simply requests that the Commission determine whether payments are due Complainants' clients who have made refund demands of Pacific for the inappropriate EUCL charges at issue[15] and do not expect that the Commission to order refunds to be made payable to Complainants. Moreover, Complainants represent that they intend to cooperate fully with Pacific in assessing overpayment claims and will provide documentation supporting any claimed overpayments.[16]

2. Discussion

7. Clearly, Complainants have standing to file a complaint alleging that Pacific has violated provisions of the Communications Act or any Commission rule or Order. Section 208 provides that "any person" may file a complaint alleging that a common carrier has violated the Act and that "[n]o complaint shall at any time be dismissed because of the absence of direct damage to the complainant." Therefore, the complaint cannot be dismissed because it was filed by communications consultants on behalf of specific end-user customers rather than by the customers themselves.

8. The question we must decide is whether Complainants were properly authorized to pursue claims for damages on behalf of the customers identified in their amended complaint. We believe that a reasonable interpretation of the letters relied upon by Complainants is that the authority granted Complainants by the named customers is broad enough to encompass the filing of damages claims. We note, for example, that the letters prepared by Access America Telemanagement and Business Telemanagement specifically authorize Delphi Associates, Inc., to represent them in connection with their EUCL dispute "until it is resolved to [their] satisfaction." Pacific's claim that the letters merely give the Complainants the right to represent the end-user customers in network access matters, not to prosecute damages claims,[17] is unavailing. Pacific has presented no evidence to support its allegation that some of the customers were unaware of the complaint filed on their behalf. In addition, it appears that Complainants' clients identified by Pacific as not taking the service at issue here had at one time taken the service.[18] In view of the foregoing, we will deny this aspect of Pacific's motion to dismiss.

B. Statute of Limitations

1. Contentions

9. Pacific has also moved to dismiss the complaint to the extent it seeks damages beyond the two year limitations period contained in Section 415 of the Act. It states that although the body of the amended complaint appears to allege actions occurring within the two-year statute of limitations, two of the exhibits show that customers on whose behalf Complainants filed their complaints received bills for the disputed service more than two years before the complaint was filed with the Commission.[19] Pacific contends that the Commission must reject Complainants' request that the Commission extend the statute of limitations

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[10] *See* Exhibits B-3, B-4, B-8, B-9, B-10, B-11, B-12, and B-13 attached to Amended Complaint.

[11] *See* Motion To Dismiss at 3.

[12] 47 U.S.C. § 208. This section states in pertinent part:

> Any person... complaining of anything done or omitted to be done by any common carrier subject to this Act, in contravention of the provisions thereof, may apply to said Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or answer the same in writing.

[13] Opposition To Motion To Dismiss at 3.

[14] Complaint, Exhibit B-1.

[15] Amended Complaint at 8.

[16] *Id.* at 8-9.

[17] Motion To Dismiss at 4.

[18] If, as cited in Complainants' Opposition to the motion to dismiss, p. 2, two clients (Southern California Gas Company and First Nationwide Bank) never took service from Pacific in the configuration in question or did not take such service at the time they were assessed additional EUCL charges, it would appear that Pacific acted improperly by billing them for services not ordered or received.

[19] Motion To Dismiss at 2.

beyond two years for customers with demand letters on file "to send a strong policy message to Pacific."[20] Pacific asserts that it is settled law[21] that the statute of limitations bars not only the remedy but also extinguishes the liability and may not be extended for punitive purposes.

10. Complainants state that their amended complaint properly encompasses claims for the two year period preceding the date they filed their informal and formal complaints with the Commission.[22] Complainants also contend that since Pacific never formally disavowed certain other claims submitted to it in writing by several of their clients on or before October 18, 1991, the Commission should award damages to these customers for the period dating back two years prior to the date of the customers' demand letters. Complainants argue that by refusing to respond to the demand letters, Pacific engaged in a pattern of conduct deliberately designed to avoid the exception to the statutory period contained in Section 415(c) of the Act.[23]

2. Discussion

11. Initially, we note that Pacific does not dispute the Complainants' claim that certain customers on whose behalf Complainants filed the instant complaint had submitted written demands for the return of alleged overcharges on or before October 18, 1991. Nor does Pacific persuasively counter the Complainants' assertion that it failed to disavow these claims prior to its filing its answer to complaints filed with the Commission on behalf of various customers on March 29, 1992. Under these circumstances, the application of Section 415(c) of the Act is clear. The two year limitations period can be extended for up to two years from the time a carrier disavows a customer's written claim for overcharges if the customer had transmitted that claim to the carrier within two years from the time the cause of action accrued.[24] We conclude, therefore, that to the extent Complainants' customers covered by the complaint had written demand letters on file with Pacific for the overcharges at issue, the statute of limitations began to run on March 29, 1992, the date Pacific filed its answer disavowing the overcharge claims. This disavowal would cause the statute to expire on March 28, 1994, a period that clearly encompasses the claims set forth in the amended complaint in this matter.

III. SUBSTANTIVE CLAIMS

A. Contentions

12. Complainants contend that Pacific's application of EUCL charges to their clients' FX lines between central offices violates both the letter and intent of 47 C.F.R. § 69.104(a)[25] and, therefore, is unjust and unreasonable under Section 201(b) of the Act and unreasonably discriminatory under Section 202(a) of the Act.[26] They contend that the FX line between the two central offices at issue here does not fit the definition of a non-traffic sensitive (NTS)[27] common line to which the EUCL charge would apply because it does not connect directly to the end user's premises or serve as that customer's access point to the system.[28] Complainants contend that the language of Section 69.104 of the rules clearly establishes that if the line does not terminate at an end user premises, the EUCL charge does not apply.

13. Furthermore, Complainants contend that the language in Section 4.6(c) of Pacific's Tariff F.C.C. No. 128 contradicts Pacific's position. Complainants claim that the tariff specifically describes Centrex as a service that: (1) uses a portion of a telephone company's switch located at the telephone company central office to meet the customer's internal needs, and serves as the customer's interface with the local loop and interexchange network; and (2) links the customer's main stations to the telephone company switch with subscriber loops. Complainants contend that the FX lines in question are not subscriber local loops.[29] They point out that Pacific, itself, does not contend that a Centrex central office qualifies as a customer's prem-

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[20] *Id.* at 6.

[21] *Id.*

[22] Bill Correctors originally filed a request for declaratory ruling setting forth the claims on January 13, 1992. That pleading was converted to an informal complaint (I-92-03700) on February 27, 1992. The Complainants filed their original formal complaint on July 13, 1992.

[23] Section 415(c) provides, in pertinent part:

> that if the claim for overcharge has been presented in writing to the carrier within the two-year period of limitation said period shall be extended to include two years from the time notice in writing is given by the carrier to the claimant of disallowance of the claim, or any parts thereof.

47 U.S.C. § 415(c).

[24] The Commission addressed the issue of accrual under Section 415 in Armstrong Utilities, Inc. v. General Tel. Co. of Pennsylvania in which it stated that while the Communications Act itself does not specify the point of accrual of the cause of action:

> the cause of action which commences the limitations period "accrues when the carrier does the unlawful act or fails to do what the law requires, on account of which damages are claimed."

25 FCC 2d 385, 390 (1970).

[25] 47 C.F.R. § 69.104(a) provides, in pertinent part, that: "such charge [EUCL] shall be assessed for each line between the premises of the end user and a Class 5 office of the telephone company that is or may be used for local exchange service transmissions."

[26] 47 U.S.C. §§ 201(b) and 202(a). Section 201(b) provides that all charges for interstate communications services "shall be just and reasonable." Section 202(a) provides, in pertinent part that: "[i]t shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges ... for or in connection with like communications service."

[27] NTS facilities include loops and parts of central office plant, the costs of which are fixed whether they are used or not. The costs of NTS lines are allocated between state and federal jurisdiction according to rules appearing in Part 36 of the Commission's rules. The EUCL charge was designed to recover the interstate cost of the plant from the ratepayers.

[28] Complainants contend these facilities are more like transport facilities than common line facilities, as those terms are used in Part 69 of our rules, because they do not link a subscriber's premises to the end office providing access to the network. From this premise Complainants conclude that no EUCL charge should attach these lines.

[29] Moreover, Complainants aver that the FX lines in this situation are functionally equivalent to a remote call forwarded line or a closed end WATS line, both of which are specifically exempt from the EUCL charge.

ises since Pacific has openly opposed co-location in the past.[30] Complainants cite to testimony submitted by Pacific to the California Public Utility Commission in which Pacific represented that FX services are network services, not local access services.[31]

14. In response, Pacific challenges Complainants' statement that an FX line "is not used to connect two Class 5 offices; rather it is used to extend the local loop to a foreign central office for dial tone."[32] Pacific denies that the common transport access element has any relevance to this complaint because the services at issue are local exchange services and not access services.[33] It further avers that the Class 5 office to which 47 C.F.R. § 69.104(a) refers is the central office that provides the dial tone.[34] Pacific argues that because the FX lines at issue are intended only to extend the dial tone to another central office, this dial tone office is the point of access to the public switched telephone network and EUCL charges apply because the FX lines run between the customers' premises and the Class 5 office from which the customers receive access to the network.

15. Pacific argues that if the Complainants' rationale for not applying EUCL charges were accepted, a customer-owned PBX[35] and Centrex service would be assessed the same EUCL charge, a result Pacific claims is contrary to the terms of its tariff and the Commission's rules.[36] Pacific maintains that its action in assessing the EUCL charge at issue is in conformance with it its filed tariff, and in accordance with Commission rules.[37]

B. Discussion

16. After careful consideration of the evidence and arguments presented by the parties, we find no support in Pacific's tariff or the Commission's rules for Pacific's imposing a second EUCL charge on the parties for the FX lines at issue.[38] We conclude, therefore, that Pacific violated Section 201(b) of the Act by assessing the improper EUCL charges.[39]

17. In its answer to the original complaint, Pacific asserts that the EUCL charges comply with Section 69.104 of the Commission's rules,[40] which it claims requires that such charges be assessed on any FX line between a customer's premises and the Class 5 office from which dial tone is received. We find no evidence to show, however, that the Class 5 office at which the parties' FX lines terminate can reasonably be defined as customer's premises for purposes of assessing EUCL charges. Pacific's assertion that the FX lines do not interconnect Class 5 offices but rather extends the local loop to a remote central office does not warrant the imposition of a second EUCL for this service configuration. To view this otherwise would logically lead to imposition of multiple EUCLs based upon the number of intermediate central offices through which the link between a customer and its serving office or Centrex offices pass. Moreover, by the clear language of Section 69.104 of the rules, EUCL charges cannot be applied to lines that do not terminate on the end user's premises. This is consistent with the principle that an end user accessing the network once should pay only once for such access. In the service configuration presented by the instant complaint, it is clear that only one access point exists; the access point has simply been linked to the customer's serving office by a regular loop joined to an FX line.[41] [42]

IV. DAMAGES

18. In view of the above, we find that Pacific unlawfully charged Complainants' clients additional EUCL charges for the FX lines at issue. The proper measure of damages in the case of overcharges is usually the amount overpaid by the customer plus interest compounded daily from the date the overbilling occurred.[43] Complainants have acknowledged, however, that the record developed thus far does not provide a basis sufficient to determine the precise amount of damages owed to Complainants' end-user customers identified in the amended complaint. We note further that Complainants have expressed a willingness to work cooperatively with Pacific to resolve any disputes over the amounts paid by the affected customers for the improper EUCL charges. In the interest of facilitating the earliest possible resolution of this long standing controversy and avoiding the need for further, costly proceedings, we direct the parties to engage in good faith negotiations consistent with the findings and conclusions of this Memorandum

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[30] Complaint at 20.

[31] *Id.* at 21, *citing* Marin Telemanagement Corp. v. Pacific Bell (Consolidated cases 90-11-021 and 91-09-034 and Application 91-01-009).

[32] Answer at 3-4.

[33] *Id.*

[34] *Id.* at 4.

[35] PBX stands for private branch exchange and is a customer's own communications system. It consists of the switchboard or other switching equipment, customer-provided equipment such as telephones and facsimile machines, and the internal wiring to connect the equipment to the switching board.

[36] Answer at 5.

[37] *Id.* at 14.

[38] We do not address the arguments advanced by the parties attempting to characterize the type of service provided here since they are irrelevant to our determination that the second EUCL charge is unlawful.

[39] Given our finding that the charges at issue are unlawful under Section 201(b), we need not address Complainants' claim that the charges are unreasonably discriminatory under Section 202(a) of the Act. Moreover, it is doubtful that the limited record submitted by the parties on this issue would enable us to make the required analysis of Complainants' Section 202(a) claims without resort to further fact finding and pleadings.

[40] Answer at 17.

[41] We do not accept Pacific's claim that the services at issue are local exchange services rather than access services and, by implication, not governed by interstate access rules. Regardless of the nature of the facilities used, the instant FX lines are clearly jurisdictionally interstate and, thus, by definition constitute a part of the interstate access service. *See, e.g., People of the State of California v. F.C.C.*, 567 F.2d 84 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1010 (1978).

[42] We note that Pacific has also argued that if we were to sustain Complainants' position vis a vis the second EUCL charge, such a finding would conflict with the way in which EUCL charges are currently applied to Centrex services. We disagree. Section 69.104(a) of the Commission's rules specifically states how EUCL charges are to be applied to Centrex services and our action herein is consistent with these rules. *See* 47 C.F.R. § 69.104(a).

[43] *See* Allnet Communications Services, Inc. v. Bell Atlantic, 8 FCC Rcd 1347 (1993). *See also* MCI Telecommunications Corp. v. AT&T, 94 FCC 2d 332, 343-46 (1983).

Opinion and Order to resolve the amount of damages and the method of repayment.[44] The parties are further directed to report to the Bureau's Enforcement Division staff within sixty (60) days of the date after the claims have been resubmitted whether agreement on the amount of damages has been reached or, absent such agreement, the need for further action by the Bureau. If the parties are unable to resolve this matter, Complainants will have an additional thirty (30) days in which to file a supplemental complaint for the determination of damages.

V. ORDERING CLAUSES

19. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 201(b), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 4(i), 201(b), and 208, and the authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the Motion To Dismiss filed by Pacific in the above-referenced matter IS GRANTED consistent with our findings and conclusions in this Memorandum Opinion and Order and IS DENIED in all other respects.

20. IT IS FURTHER ORDERED that the above-referenced complaint IS GRANTED to the extent indicated above and IS DISMISSED or DENIED in all other respects. Pacific is expected to take the action necessary to assure that its charges for service covered by this Memorandum Opinion and Order meet the requirements of Section 201(b) of the Act, Part 69 of the Commission's rules, and the provisions of its applicable tariff.

21. IT IS FURTHER ORDERED that Complainants and Pacific engage in good faith negotiations consistent with the findings and conclusions of this Memorandum Opinion and Order to determine the appropriate amounts owed to Complainants' clients in connection with the overcharges we find in this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen M.H. Wallman
Chief, Common Carrier Bureau

[44] We would expect the parties to resolve the issue of damages in a manner that precludes the possibility of future claims by Complainants' clients on the same cause of action.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 90-357

In the Matter of

Amendment of the Commission's
Rules with Regard to the
Establishment and Regulation of
New Digital Audio Radio Services

REPORT AND ORDER

Adopted: January 12, 1995; Released: January 18, 1995

By the Commission: Commissioners Quello, Barrett, Ness and Chong issuing separate statements.

1. By this action, the Commission allocates spectrum in the 2310-2360 MHz band for satellite digital audio radio services (DARS). This domestic allocation is in accordance with the international allocation made at the 1992 World Administrative Radio Conference (WARC-92).[1] Our action today is the first step toward providing the American public with new multi-channel, multi-format digital radio services with sound quality equivalent to compact disks. These new services will be available by satellite to nationwide and regional audiences. Service and licensing rules for the new satellite DARS services will be addressed in a subsequent rule making. This proceeding has also addressed experimental technologies designed to implement digital broadcasting within the current AM and FM allocations. When the experimental results indicate the feasibility of implementing such systems, we will act expeditiously to consider any appropriate changes to our rules.

BACKGROUND

2. On August 1, 1990, the Commission issued a *Notice of Inquiry (NOI)* soliciting information to be used in identifying spectrum and developing technical rules and regulatory policies for DARS in the United States.[2] In the *NOI,* we noted international interest in the development of digital sound broadcasting and expressed concern that the United States would be disadvantaged if it did not participate in this new technology. In a parallel effort, by a series of inquiries between 1989 and 1991, the Commission solicited comment on appropriate U.S. positions to be taken at the World Administrative Radio Conference to be held in Spain in 1992, on possible spectrum to be used for the provision of digital audio programming by the broadcasting satellite service, or BSS (Sound).[3] Based on the inquiries, and in coordination with the National Telecommunications Information Administration (NTIA), the Commission supported a U.S. position seeking an allocation for satellite and complementary terrestrial DARS at 2310-2360 MHz.[4]

3. At WARC-92, three different BSS (Sound) allocations were adopted.[5] For the United States, International Radio Regulation RR750B allocated the 2310-2360 MHz band for digital audio satellite broadcasting. This allocation, like those adopted for other areas of the world, was limited to audio broadcasting by digital modulation. Resolution 528, also adopted at WARC-92, limits the introduction of BSS (Sound) systems to the upper 25 MHz of each of the allocated bands, pending action at a competent conference to be convened no later than 1998 to address planning of broadcast satellite services, development of procedures for coordinated use of complementary terrestrial broadcasting, and criteria for sharing with other services.[6]

4. On November 6, 1992 the Commission released the *Notice of Proposed Rule Making and Further Notice of Inquiry (NPRM),* in which we proposed to adopt the WARC-92 allocation of 2310-2360 MHz for satellite DARS; proposed to accommodate aeronautical telemetry services now operating in the 2310-2390 MHz band at 2360-2390 MHz; and solicited comment on regulatory and technical aspects of satellite DARS.[7] In the Further Notice of Inquiry, we recognized efforts to implement DARS within the existing radio broadcast spectrum. We stated that "existing broadcasters can and should have an opportunity to take advantage of new digital radio technologies," and requested comment on the latest developments in terrestrial DARS and "possible accommodation of both AM and FM broadcasters in a new system of digital broadcasting." In 1992, we also accepted for comment a license application from Satellite CD Radio, Inc. (SCDR) to operate a satellite DARS system and invited competing applications. Digital Satellite Broadcasting Company (DSBC), Primosphere Limited Partnership (Primosphere), and American Mobile Radio Corporation (AMRC) each submitted applications.[8] As a result, there are currently four pending satellite DARS license applications.

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[1] *See* International Telecommunication Union, *Final Acts of the World Administrative Radio Conference* (Malaga-Torremolinos, 1992) (*Final Acts*).

[2] *See Notice of Inquiry,* GEN Docket No. 90-357, 5 FCC Rcd 5237 (1990).

[3] *See Notice of Inquiry,* GEN Docket No. 89-554, 4 FCC Rcd 8546 (1989); *Second notice of inquiry,* GEN Docket No. 89-554, 5 FCC Rcd 6046 (1990); *Supplemental Notice of inquiry,* GEN Docket No. 89-554, 6 FCC Rcd 1914 (1991).

[4] *See Report,* GEN Docket No. 89-554, 6 FCC Rcd 3900 (1991). We deem complementary terrestrial DARS to be an adjunct to a satellite-based system, rather than a separate, stand-alone terrestrial service. *See Notice of Proposed Rule Making and Further Notice of Inquiry,* 7 FCC Rcd 7776 (1992) at n.9.

[5] In addition to the 2310-2360 allocation, WARC-92 also allocated the 1452-1492 MHz band for BSS worldwide and 2520-2670 MHz for BSS service limited to national and regional systems for community reception. *See Final Acts* at 45, 71.

[6] *See Final Acts* at 239.

[7] *See NPRM,* 7 FCC Rcd 7776 (1992).

[8] In the *NPRM,* we deferred a tentative decision on award of pioneer's preferences for satellite DARS because we found that DARS technology was rapidly evolving, but was not yet fully developed. *See NPRM,* at note 15. In October 1993, we initiated a review of the pioneer's preference rules in ET Docket No. 93-266 to assess the effect on these rules of our authority to assign licenses by competitive bidding, as recently authorized by Congress. *See Notice of Proposed Rule Making,* 8 FCC Rcd 7692 (1993). In the *First Report and Order* in that proceeding, we deferred a decision as to whether to apply our existing pioneer's

5. Additionally, two industry committees are considering DARS technical standards issues. The Electronics Industry Association (EIA) has formed a subcommittee to consider the development of standards for terrestrial and satellite DARS. Also, the National Radio Systems Committee (NRSC) has agreed to examine terrestrial DARS systems which would operate in the AM or FM broadcast bands, and EIA and NRSC are cooperating in testing such DARS technologies.

COMMENTS

6. Comments were received from a wide variety of parties both in support of and in opposition to the allocation. Proponents of the allocation, including potential DARS providers, equipment manufacturers, and potential users, state that there will be major benefits from satellite DARS. These parties argue generally that a satellite-delivered system will meet the needs of unserved and underserved markets as well as provide enhanced quality of reception and increased audio program diversity. Further, they point out that a satellite DARS system that would provide enhanced quality of reception for all listeners is currently feasible. In addition, they assert that the allocation would create economic opportunities in the United States for various segments of industry, especially manufacturers of DARS-related equipment. Finally, proponents argue that a satellite DARS will improve U.S. competitiveness in the world marketplace.

7. Opponents, primarily existing broadcast entities, either reject a satellite DARS allocation or recommend that an allocation not be adopted until terrestrial DARS allocation options have been fully explored. Many of these commenters argue that satellite systems will adversely impact present AM/FM radio services by driving local stations out of business. This, they contend, will cause a loss of local service, which a satellite service by its nature cannot replace. This effect, these opponents argue, contravenes the intent of the Communications Act of 1934 (the Act) that local needs be met by broadcast media. In addition, opponents argue that programming will become less, not more, diverse as a result of satellite DARS. National Public Radio and the Corporation for Public Broadcasting (NPR/CPB) do not oppose a satellite DARS allocation, but recommend that the Commission allocate frequencies in the 1.4-1.5 GHz band in lieu of the proposed allocation. NPR/CPB believe that L-band frequencies have better sharing characteristics that those in the S-band.[9]

8. Several proponents of a satellite DARS allocation, including Muzak, DBS Division (Muzak), WPFW, and Innovative Communications Technologies, Inc. (Innovative) assert that the allocation will create new business opportunities in the audio broadcast industry, especially for companies engaged in the design and manufacture of DARS-related systems.[10] Similarly, All Pro Sports and Entertainment, Inc. (All Pro) contends that a satellite DARS allocation will expand sports and entertainment programming and create related jobs; and WHUR-FM, Howard University (WHUR), suggests that this new technology will create opportunities for job training and employment.[11] Further, the Recreation Vehicle Industry Association (RVIA) believes that the new service will increase the utility of RVs and thus promote the RV industry.[12]

9. Several parties suggest that a principal benefit of satellite DARS will be the provision of high quality audio service to markets that are presently unserved or underserved because of either geographic or social and economic considerations. For example, Muzak and DigiNet Communications, Inc. (DigiNet) argue that satellite DARS will allow more customers and more locations to receive enhanced audio service.[13] Dolby Laboratories (Dolby) recommends that the Commission act immediately to promote nationwide satellite DARS.[14] The Maine Farm Bureau Association (Maine) states that the allocation would significantly increase access to sources of information and entertainment.[15] Similarly, the Wyoming Farm Bureau Federation (Wyoming) contends that satellite DARS would alleviate many of the reception problems caused by Wyoming's mountainous terrain and low population density.[16] The Education Development Center (EDC), a non-profit institution founded for the purpose of educational improvement, maintains that satellite DARS will provide the capability to deliver educational audio programming to remote and rural areas of the country and extend educational opportunities outside of the classroom.[17]

10. Further, several other groups point out that specific niche markets hitherto unserved or underserved for social and economic reasons may now be served by satellite DARS. For example, the Office of Communications of the United Church of Christ (UCC) believes that satellite DARS service can serve minority ethnic and cultural interests that might otherwise not receive programming directed to a narrow audience.[18] Similarly, the National Asian American Telecommunications Association (NAATA) agrees that ethnic and niche groups will benefit by the introduction of a nationwide service offering high quality, diverse programming.[19]

11. In addition, proponents generally agree that satellite DARS will lead to an increase in program diversity. All Pro argues that the potential demand for niche-oriented audio programming is analogous to the proliferation of cable television programming, which has grown because of increases in channel availability and increased market size. Not allocating spectrum to satellite DARS, All Pro asserts, would fail to promote diverse and equitable audio programming coverage for the entire U.S. population.[20]

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preference rules in situations in which tentative pioneer's preference decisions have not been issued. *See* 9 FCC Rcd 605 (1994). Final action in Docket 93-266 is still pending; therefore, we will continue to defer action on satellite DARS pioneer's preference requests.

[9] *See* Comments of NPR/CPB at 5-9.

[10] *See* Muzak Comments at 2; Innovative Comments at 1; WPFW Comments at 2-3.

[11] *See* All Pro Comments at 2; WHUR Comments at 1.

[12] *See* RVIA Comments at 3.

[13] *See* Muzak Comments at 2; DigiNet Comments at 2.

[14] *See* Dolby Comments at 2-3.

[15] *See* Maine Comments at 1.

[16] *See* Wyoming Comments at 1.

[17] *See* EDC Comments at 1-2.

[18] *See* UCC Comments at 2.

[19] *See* NAATA Comments at 2; *s ee also* Comments of Native American Public Broadcasting Consortium, Inc. at 1-2.

[20] *See* All Pro Comments at 2.

WHUR and DigiNet believe that satellite DARS will widen programming possibilities for local radio regardless of geography.[21]

12. In response to concerns about the impact of DARS on terrestrial broadcast service, several parties argue that satellite DARS will have minimum impact on those services. For example, DSBC maintains that satellite DARS will not hurt the financial status of terrestrial radio and states that terrestrial broadcasters will have an opportunity to participate in providing DARS.[22] UCC contends that DARS would be able to serve minority ethnic needs without hurting traditional radio service and might spur digital terrestrial development as well. It also argues that protectionism should not be allowed to block DARS implementation; rather, the decision to utilize DARS should be left to the consumer.[23]

13. Proponents of the satellite DARS allocation further contend that the new service will promote technological development and help the competitive position of the United States. For example,WavePhore, Inc. (WavePhore), an equipment manufacturer, maintains that satisfying consumer demand for high quality broadcast audio will benefit high technology manufacturers and further the development of new technologies.[24] On Call Communications, Inc. (OCC) states that DARS will aid the continued growth of technological developments in satellite communications and audio compression. [25] Similarly, DigiNet states that permitting the allocation will lead to applications in other areas of digital communications and to advances in areas such as compression and satellite transmission.[26] Further, Innovative argues that the growth of digital information transmission would enhance the capabilities and utility of the frequency spectrum and extend digital media into many aspects of everyday life.[27] In addition, Digital Evolutions, Limited (Digital) suggests that the ability to send high data rate audio programming to mobile locations over satellite DARS systems has several potential benefits, including the incorporation of DARS into Intelligent Vehicle and Highway Systems (IVHS). Digital suggests that IVHS/DARS could be used to transmit traffic, weather, and emergency advisories directly to vehicles, and that the ability to receive this information even in locations far from metropolitan areas would increase the effectiveness of such advisories by increasing listeners' planning time and by widening their range of alternative routing possibilities.[28]

14. Loral Aerospace Holdings, Inc. (Loral) states that the expeditious allocation and licensing of satellite DARS is necessary in order to maintain the U.S. lead in technology over other countries, which are currently developing a system in the L-band.[29] Primosphere agrees that rapid implementation of satellite DARS will increase the ability of American industry to compete in international markets.[30] Primosphere suggests that the Commission establish a timetable for moving current aeronautical telemetry users of the band to other frequencies so that satellite DARS can be implemented by 1997.[31]

15. Parties favoring a satellite DARS allocation generally support allocating the 2310-2360 MHz band proposed in the *NPRM* and generally support immediate use of the entire band. Loral argues that the 2310-2360 MHz band is sufficient and appropriate for satellite DARS. DSBC and SCDR contend that the entire 50 MHz should be made available domestically for immediate use despite the fact that WARC-92 Resolution 528 limited the introduction of service to the upper 25 MHz of the band until a conference is held to plan the BSS (Sound) service. SCDR asserts that the limitation on use imposed by WARC-92 served two purposes: to provide an orderly transition for terrestrial services displaced from the band and to ensure that BSS (Sound) orbital slots and frequencies remain available for less developed countries. SCDR and DSBC conclude that neither of the purposes of the policy is served by its application in the United States and that Resolution 528 should therefore not be binding on the Commission.[32] Immediate action on the full domestic spectrum allocation for satellite DARS is necessary, according to DSBC, to assure continued U.S. lead in high technology radio services. Primosphere and AMRC also urge the Commission to allocate the entire 50 MHz at 2310-2360 MHz.[33]

16. Because mobile use of the 2310-2390 MHz band is currently limited to aeronautical telemetering and associated telecommand operations for flight testing,[34] the national aerospace manufacturers are especially concerned with the choice of band for any new service. The Aerospace and Flight Test Radio Coordinating Council (AFTRCC), an association of the nation's principal aerospace manufacturers, agrees that allocating the 2310-2360 MHz band for satellite DARS is feasible. AFTRCC's states that it prefers an allocation of the 2310-2360 MHz band to an allocation of the 1435-1530 MHz band, which had been considered as an early option for a satellite DARS allocation. Although both of these bands are currently allocated to aeronautical telemetry, AFTRCC favors use of the 2310-2360 MHz band as the least intrusive to the needs of the aerospace testing community.[35]

17. Opponents of the satellite DARS spectrum allocation argue that the new service would bring about the demise of local radio service by forcing current AM/FM stations out

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[21] *See* WHUR Comments at 1; DigiNet Comments at 2. *See also* Comments of Comstream Corporation at 2; Comments of Joseph Jones at 1-2.

[22] *See* DSBC Comments at 7. Monitor Radio points out that no demonstration has been made yet that an in-band approach will allow delivery of DARS in the FM band at an early date. *See* Comments of Monitor Radio at 1-2.

[23] *See* UCC Comments at 7.

[24] *See* WavePhore Comments at 1-2. *See also* Comments of Rollins Hudig Hall at 2.

[25] *See* OCC Comments at 2.B

[26] *See* DigiNet Comments at 2.

[27] *See* Innovative Comments at 2.

[28] *See* Digital Comments at 1-2.

[29] *See* Loral Comments at 6.

[30] *See* Primosphere Comments at 2.

[31] *See id.* at 8-9.

[32] *See* DSBC Comments at 12; SCDR Opposition to Petitions to Deny and Response to Comments, filed December 1, 1992, at 21. DSBC suggests that 25 MHz be allocated for code division multiple access and 25 MHz for other access technologies. *See* DSBC Reply Comments at 6.

[33] *See* Primosphere Comments at 5; AMRC Comments at 4.

[34] *See* footnote US 276 to §2.106 of our Rules.

[35] *See* AFTRCC Comments at 2. We note that the National Aeronautics and Space Administration (NASA) filed comments expressing concern that DARS emissions may cause interference to the NASA Deep Space Network, which receives in the 2290-2300 MHz band. *See* NASA Comments at 2. This concern will be addressed in the licensing and service rules to follow.

of business. They argue that these stations are unlikely to survive the competition of a nationwide satellite-delivered service. For example, Shamrock Broadcasting, Inc. *et al.* (Shamrock) argues that the radio marketplace is already highly competitive, and a variety of specialized audio channels is available to cable television subscribers at a cost approximating that projected by potential satellite DARS providers. Shamrock contends that the increased competition represented by satellite DARS will jeopardize local radio and the public service that it provides.[36] Mount Wilson FM Broadcasters (Mount Wilson) states that many new FM stations have already been added,[37] and that given this extremely competitive market, FM stations would not be in a position to compete with a nationwide commercial service such as DARS.[38] Further, KSBJ contends that the large budgets of satellite companies would permit them to provide programming that would draw away local listeners, thus fragmenting local audiences to the point where small stations could no longer survive.[39]

18. Opponents also argue that satellite DARS will not be able to replace existing broadcast outlets with adequate service. The Alabama Broadcasters Association (ABA) contends that the current rules on localism – the main studio rule, political and cablecasting law, and broadcast renewal expectancies, for example – are geared toward promoting strong community radio stations.[40] Shamrock similarly argues that local radio stations will suffer fatally from the competition posed by a new satellite service. Shamrock also notes that such a service, which will reach 261 markets throughout the entire country, unduly concentrates control of radio service, in contravention of the Commission's recent efforts to limit the number of stations that can be controlled by one entity.[41] BSB Communications (BSB) contends that the governmental interest in supporting local service is demonstrated again in the Cable Television Consumer Protection and Competition Act of 1992, which supports the maintenance of free local commercial television. Satellite DARS, on the other hand, would create a national monopoly of superstations not tied to any community.[42]

19. Several opponents of allocating spectrum in the 2310-2360 band for satellite DARS argue that the Commission should focus its efforts on improving existing radio service by introducing terrestrial DARS. NAB, for example, maintains that the best option for implementing digital broadcasting is by allowing terrestrial DARS on current broadcast channels.[43] NAB states that broadcasters have been in the forefront of DARS developments and have worked consistently to develop a plan to bring the significant improvements of DARS to their listening audience.[44] NAB argues that allocation and authorization of satellite DARS will hinder and threaten the successful implementation of terrestrial DARS and will present a potential danger to free local radio service.[45] Noble Broadcast Group, Inc. (Noble) contends that the introduction of DARS to the existing framework of commercial and non-commercial broadcast stations holds great promise for improving the long-term commercial viability of the AM and FM services. Therefore, Noble urges the Commission to delay the authorization of satellite DARS until terrestrial DARS is well advanced.[46] Noble further argues that the early introduction of terrestrial DARS, based on the existing framework of more that 11,000 aural broadcast stations, is more likely to afford a stimulus to the nation's electronics industry than satellite DARS.[47]

20. On September 7, 1994, SCDR submitted an *ex parte* filing entitled "Satellite Radio" containing an economic analysis of the predicted impact of satellite DARS on traditional radio service. On December 27, 1994 the NAB filed a response entitled "The Truth About Satellite Radio." In its filing, SCDR makes a number of points which it believes suggest that DARS will pose no threat to local radio service. According to SCDR, satellite radio will be supported by subscription and/or by national advertising, whereas local radio is supported by local advertising and thus satellite radio should have little or no impact on local station advertising revenues. SCDR draws analogies between satellite radio's predicted small impact on terrestrial radio and the small impact of other services on potential competitors such as the lack of impact by automobile cassette and CD players on auto radio listenership, and the small impact of cable, especially pay cable, on over-the-air television broadcasting. SCDR also predicts that satellite radio will only penetrate 3-10% of the auto radio market within 10 years. Hence, SCDR suggests that satellite radio will have minimal impact on terrestrial radio service revenues. According to SCDR, the radio industry is currently doing quite well, measured by growth of advertising revenues, share of advertising, cash flow multiples, revenue per station and the rising sales price of stations. Thus, SCDR believes that the Commission should not be concerned about any possible adverse impact on terrestrial radio service.

21. In contrast, NAB claims that satellite radio could have a devastating impact on community service and will largely duplicate the programming and formats of local radio stations. NAB argues that the impact of satellite radio on conventional radio is not analogous to that of cassette tapes or the impact of cable on over-the-air television. According to NAB, in 1992 60% of radio stations were losing money. From 1987 to 1993 real revenue per station declined for small market stations. While SCDR suggests that most of the audience for satellite radio will be people in automobiles, NAB believes that audiences at fixed locations might also listen to satellite radio so that its impact on terrestrial radio audiences will be larger than that sug-

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[36] *See* Shamrock Comments at 7-11. *See also* Comments of Chisolm Trail Broadcasting at 1; WIN Communications Inc. at 1; KGNZ-Christian Broadcasting Co., Inc. at 1.

[37] In MM Docket 80-90, we created new classes of FM radio stations. We estimate that at least 1300 new FM allotments were created because of Docket 80-90.

[38] *See* Mount Wilson Comments at 2-3; *see also* Comments of Putbrese and Hunsaker at 9.

[39] *See* KSBJ Comments at 2.

[40] *See* ABA Comments at 3-4.

[41] *See Revision of Radio Rules and Policies,* 7 FCC Rcd 6387 (1992).

[42] *See* BSB Comments at 1-2.

[43] *See* NAB Comments at 4; *see also* Comments of Susquehanna Radio Corporation at 2-3.

[44] *Id.* at 6.

[45] *Id.* at 9-16.

[46] *See* Noble Comments at 2-3; *see also* Comments of Putbrese and Hunsaker at 13.

[47] *See id.* at 4.

gested by SCDR. NAB predicts that satellite radio will lead to larger audience loss, larger revenue loss and a larger cash flow loss for terrestrial stations than SCDR predicts. Hence, NAB concludes that satellite radio will surely harm terrestrial service.[48]

DECISION

22. We conclude that the record supports a spectrum allocation for satellite DARS and that the allocation is in the public interest. Satellite DARS will provide continuous radio service of compact disk quality for all listeners and will offer an increased choice of over-the-air audio programming.[49] Further, a satellite delivery system for DARS will make it possible to serve segments in the United States which are currently underserved and unserved. As suggested by some proponents, a satellite DARS system has the potential to provide new services to rural listeners, minority and ethnic groups, and audiences whose first language is not English.[50] In addition, this new service will provide opportunities for domestic economic development[51] and improve U.S. competitiveness in the world marketplace.[52] Finally, based upon the record before us, we are unable to conclude at this time that the introduction of satellite DARS will have a significant adverse impact on existing radio services.[53] The size of the impact on terrestrial radio will depend on many factors, including the specific number and types of services that a future satellite DARS might offer, the cost of the service to the public, and the future development of terrestrial DARS. While we believe that it is possible that competition from a new regional or national satellite radio service might diminish the financial ability of some terrestrial stations to provide local service, we are not now prepared to deny the allocation of spectrum for future satellite DARS and the benefits that may accrue from the provision of such service to the public, on the basis of potential for economic harm to some stations.

23. We have previously addressed the legal issue of the impact of satellite services on the localism component of Section 307(b) in the context of Direct Broadcast Satellite (DBS),[54] and our analysis of the issue was affirmed by the court in *National Association of Broadcasters v. FCC*, 740 F.2d 1190 (1984). Section 307(b) of the Communications Act requires a dispersal of radio services among the several states and communities so as "to provide a fair, efficient, and equitable distribution of radio service to each of the same." We find that a nationwide or regional system such as satellite DARS, which serves even the most remote communities, is a furtherance of the Commission's commitment to an equitable distribution as set forth in Section 307(b).[55] The court's reasoning in *NAB v. FCC* with respect to the issues of local as opposed to national or regional broadcasting is apposite here. The court reasoned that the framers of the Act could not have foreseen the technological developments represented by satellite services, yet it would be anomalous to read the Act so as to prevent the FCC from authorizing an innovative technology that would confer benefits on all Americans.[56] The court therefore held that "not *every* communications service approved by the Commission need be tied to a local community."[original emphasis][57] Further, the court indicated that the Act does not bestow an exclusive right on any service: "existing systems, like existing licensees, have no entitlement that permits them to deflect competitive pressure from innovative and effective technology."[58] We continue to find that a nationwide service such as that being proposed in satellite DARS is in fact capable of furthering the Congressional intent to distribute radio services widely and thus supplement, rather than supplant, local broadcast stations, and we reject the suggestion that we must protect one service at the expense of an entirely new technology. Accordingly, we conclude that commenters' concerns with respect to attenuation of local service do not obviate our approval of the spectrum allocation for satellite DARS.

24. As to the studies submitted by SCDR and NAB, we are not entirely persuaded by either submission. Neither commenter fully discloses the data used nor explains the assumptions, models or methodology used to make their predictions or projections. It may be that SCDR understates the possible impact on terrestrial radio and that NAB overstates it. However, a number of factors which we feel may be relevant in making such predictions about the economic impact of satellite DARS were not analyzed or discussed by either SCDR or NAB. For example, the size of the listening audience for satellite DARS and its potential for diverting listeners from terrestrial stations and corresponding impact on station audience, revenues and ultimately cash flow and profits will depend upon many factors which are unknown. Among the unknown factors are the number and types of programs that might be offered on a satellite service; the quality of the sound provided compared to that available from terrestrial service; the degree to which satellite services might be subscription based or advertiser supported, and if subscription supported, the price of the subscription fee; and the extent to which, at the time a satellite DARS might begin operat-

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[48] DSBC, SCDR, and Primosphere all filed oppositions to NAB's response, and AMSC filed a letter re-asserting its conviction that DARS should be authorized as soon as possible. DSBC argues that NAB has presented no new issue to the Commission which would require the delay of the DARS spectrum allocation and. points out that the Commission and the courts have concluded that considering the economic impact of new services upon old is not a sound policy. Further, SCDR contends that NAB's arguments about the viability of traditional radio are either mistaken or beside the point and that satellite DARS represents no threat to conventional radio. Finally, Primosphere submits a statement of one of its principals which repeats the arguments that satellite DARS will have no detrimental effect on terrestrial radio for at least ten years and a small effect thereafter.

[49] *See* comments in support, *supra*, ¶ 11.

[50] *See* comments in support, *supra*, ¶ ¶ 9-10.

[51] *See* comments in support, *supra*, ¶13.

[52] *Id.*

[53] *See* discussion ¶ ¶12, 20-21.

[54] *See Direct Broadcast Satellite: Report and Order in GEN Docket No. 80-603*, 90 FCC 2d 676 (1982).

[55] *See also* the Commission's inquiry into the meaning of "local" service in the course of its efforts to implement Section 25 of the Cable Television Consumer Protection and Competition Act of 1992, *Notice of Proposed Rule Making*, 8 FCC Rcd 1589 (1993).

[56] *See NAB v. FCC*, at 740 F.2d 1198; *see also Wold Communications, Inc. v. FCC*, 735 F.2d 1465, 1475 (D.C. Cir. 1984).

[57] *NAB v. FCC*, 740 F.2d at 1198.

[58] *Id.*

ing, a terrestrial DARS might also be in existence. Without this type of information, it is impossible to conclude with any degree of confidence that satellite DARS will have an impact on traditional radio stations that would be contrary to the public interest.

25. We are prepared to adopt an allocation for this new service at this time because we believe that it will benefit consumers and is in the public interest. At the same time, however, we note that when we consider service regulations to govern the obligations under which satellite DARS applicants would be permitted to operate, we intend to request information on and consider all relevant and available information which addresses the impact of satellite DARS on traditional service.

26. Regarding the band to be allocated, we believe that the proposed 2310-2360 MHz spectrum is appropriate. Commenters strongly favor this band over, for example, the 1.5 GHz band. Of particular importance is the aeronautical telemetry community's support for reaccommodating existing aeronautical telemetry users at 2310-2390 MHz in the 2360-2390 MHz band.[59] In addition, this band was allocated for BSS (Sound) at WARC-92, and our allocation therefore conforms to the action of that international body.

27. Further, while we are aware that Resolution 528, adopted at WARC-92, limits the use of the allocation to the upper 25 MHz pending an international BSS (Sound) planning conference to be held in 1996, we conclude that the reasons for the limitation on use of the band imposed by WARC-92 do not obtain in the present circumstance. That is, the limitation on use of the allocation imposed by WARC-92 served two purposes: to provide an orderly transition for terrestrial services displaced from the band and to ensure that BSS (Sound) orbital slots and frequencies remain available for less developed countries. We agree with SCDR and DSBC that neither of the purposes of the policy is served by its application in the United States.[60] We also note that satellite DARS systems will not be operative before 1998, and we therefore believe that such systems can take into account any sharing or planning conditions that may be imposed at a subsequent conference, if necessary. Accordingly, we believe that no purpose would be served in imposing a limit on the use of the DARS allocation at this time.

28. In addition, we continue to support efforts to implement terrestrial DARS technology. We believe that existing radio broadcasters can and should have the opportunity to profit from new digital radio technologies, and we anticipate that technical advances will soon permit both AM and FM broadcasters to offer improved digital sound. As noted above, the EIA Digital Audio Radio Subcommittee is evaluating the technical characteristics of a variety of experimental DARS transmission systems, with NRSC cooperation on terrestrial systems.[61] Some of the systems being tested are designed specifically to permit digital broadcasting within the existing AM and FM bands. We fully support these developments, and we see great promise in these innovations for providing improved services to consumers. These innovations will also help promote the future viability of our terrestrial broadcasting system, which provides local news and public affairs programming. When the test results indicate the feasibility of implementing such systems, we will act expeditiously to consider any appropriate changes to our rules.

ADMINISTRATIVE

Final Regulatory Analysis

29. Pursuant to 5 U.S.C. § 603, an initial Regulatory Flexibility Analysis was incorporated in the *Notice* in ET Docket No. 90-357. Written comments on the proposals in the *Notice*, including the Regulatory Flexibility Analysis, were requested.

30. *Need for and Objective of Rules.* Our objective is to provide a spectrum allocation for the introduction of satellite digital audio radio services. We expect that satellite DARS will benefit the public by providing higher quality, more interference resistant digital audio and ancillary services to the American public.

31. *Issues Raised by the Public in Response to the Initial Analysis.* Several parties offered comments to the proposals set forth in the *Notice*, but these did not address the initial Regulatory Flexibility Analysis.

32. *Any Significant Alternative Minimizing Impact on Small Entities and Consistent with Stated Objectives.* The alternative to allocating these bands to satellite DARS is not to allocate spectrum for this service or to accommodate it in other spectrum. We conclude that the bands proposed in the *NPRM* are the most desirable for satellite DARS. Further, existing aeronautical telemetry users of the band support the proposal.

ORDERING CLAUSE

33. Accordingly, IT IS ORDERED that Part 2 of the Commission's Rules and Regulations IS AMENDED as specified in Appendix A, effective 30 days after publication in the Federal Register. This action is taken pursuant to sections 4(i), 303(c), (f), (g), and (r), and 309(a) of the Communications Act of 1934, as amended, 47 U.S.C. sections 154(i), 303(c), (f), (g), and (r).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[59] We note that when service rules are developed for satellite DARS, we may also need to reaccommodate three frequencies allocated for space telecommand (*i.e.*, 2312.5 MHz, 2332.5 MHz, and 2352.5 MHz). *See* footnote US276 to Section 2.106 of our Rules.

[60] *See supra*, ¶ 16.

[61] *See* NPRM at n.10.

APPENDIX RULE CHANGES

I. Part 2 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

PART 2 - - FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS: GENERAL RULES AND REGULATIONS

1. The authority citations in Part 2 continues to read:

AUTHORITY: Sec. 4, 302, 303, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154, 154(i), 302, 303, 303(r), and 307, unless otherwise noted.

2. Section 2.106, the Table of Frequency Allocations is amended as follows:

a. The entry for 2300-2450 MHz is removed and new entries for 2300-2450 MHz are added in numerical order.

b. INTERNATIONAL FOOTNOTES Nos. 750B, 751A, AND 751B are added; No.743A is deleted; and 751 is modified.

c. UNITED STATES (US) FOOTNOTES Nos. US327 AND US328 are added.

§ 2.106 Table of Frequency Allocations.

International Table			United States Table		FCC Use Designators	
			Government	Non-Government		
Region 1 Allocation MHz	Region 2 Allocation MHz	Region 3 Allocation MHz	Allocation MHz	Allocation MHz	Rule Part (s)	Special Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
2300-2450 FIXED MOBILE Amateur Radiolocation	2300-2450 FIXED MOBILE RADIOLOCATION Amateur		2300-2310 RADIOLOCATION Fixed Mobile US253 G2	2300-2310 Amateur US253	Amateur (97)	
			2310-2360 Mobile Radiolocation Fixed US276 US327 US328 G2 751B G120	2310-2360 BROADCASTING-SATELLITE Mobile US276 US327 US328 751B		Digital Audio Radio Services
			2360-2390 MOBILE RADIOLOCATION Fixed US276 G2 G120	2360-2390 MOBILE US276		
664 751A 752	664 750B 751 751B 752		2390-2450 RADIOLOCATION 664 752 G2	2390-2450 Amateur 664 752	Amateur (97)	

INTERNATIONAL FOOTNOTES

* * * * *

743A delete footnote

750B *Additional allocation:* in the United States of America and India, the band 2310-2360 MHz is also allocated to the broadcasting-satellite service (sound) and complementary terrestrial broadcasting service on a primary basis. Such use is limited to digital audio broadcasting and is subject to the provisions of Resolution 528.

751A In France, the use of the band 2310-2360 MHz by the aeronautical mobile service for telemetry has priority over other uses by the mobile service.

751B Space stations of the broadcasting-satellite service in the band 2310-2360 MHz operating in accordance with No. 750B that may affect services to which this band is allocated in other countries shall be coordinated and notified in accordance with Resolution 33. Complementary terrestrial broadcasting stations shall be subject to bilateral coordination with neighboring countries prior to their bringing into use.

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UNITED STATES (US) FOOTNOTES

* * * * *

US327 The band 2310-2360 MHz is allocated to the broadcasting-satellite service (sound) and complementary terrestrial broadcasting service on a primary basis. Such use is limited to digital audio broadcasting and is subject to the provisions of Resolution 528.

US328 In the band 2310-2360 MHz, the mobile and radiolocation services are allocated on a primary basis until 1 January 1997 or until a broadcasting-satellite (sound) service has been brought into use in such a manner as to affect or be affected by the mobile and radiolocation services in those service areas, whichever is later. The broadcasting-satellite (sound) service during implementation should also take cognizance of the expendable and reusable launch vehicle frequencies 2312.5, 2332.5, and 2352.5 MHz, to minimize the impact on this mobile service use to the extent possible.

* * * * *

Separate Statement of Commissioner James H. Quello

In re: Amendment of the Commission's Rules With Regard to the Establishment and Regulation of New Digital Audio Radio Services

It is with a heavy heart, but an eager hand, that I vote today to allocate 50 Mhz of spectrum for a satellite Digital Audio Radio Service (DARS). My heart is heavy because I know only too well, as a an ex-broadcaster and an avid supporter of free, over-the-air broadcasting, of the trepidation with which broadcasters face the allocation of spectrum for a service that will compete with them for listeners. However, my hand is eager because I know, after twenty years as a Commissioner watching the explosion of the communications industry, of the promise of this new digital technology for consumers, satellite providers, and terrestrial broadcasters. Despite the challenge radio broadcasters will face from satellite DARS, I am confident that radio broadcasters will not only survive, but they will thrive. This belief is based not just on hope, but on history.

Over and over, radio broadcasters have faced new challenges that have threatened their viability. AM radio, the first broadcast service, survived the challenge of FM radio. Radio survived the introduction of television, or "radio with pictures." Radio survived (not without some pain) the allocation of more than 2,600 new FM radio stations in Docket 80-90. Radio survived the recession of the late 1980s and is now stronger than ever. Why has radio survived? Because it has distinguished itself, over and over, from the new competitors it has faced over the years. Radio's most recent success? Talk radio: though controversial, a new brand of radio characterized by its outrageousness, its personalities, its politics, its audience participation, its ratings. Moreover, this success has taken place in a marketplace bursting with a plethora of audio and video entertainment, including 12,000 radio stations, 1,520 television stations, 62.5% nationwide, over 80% VCR penetration, a rapidly growing direct broadcast satellite service (with estimated sales of 1,000,000 dishes before the summer of 1995), just to mention a few. Even more important than talk radio, the hallmark of radio that has carried it through the years is arguably the best local news and public affairs programming of any communications medium. Radio is the most immediate and universally available medium for emergency reports and warnings. Local radio stations have become vital and integral members of the communities in which they reside.

Faced with this history, I am confident that radio will stand up to satellite DARS with ingenuity and aplomb. Satellite DARS, while promising to provide CD quality sound, niche music programming, and programming to special interest groups, nonetheless will not, because of the national nature of the service, be able to provide local news and public affairs programming. Thus, satellite DARS will never be embraced by local communities (including local advertisers) in the same way as terrestrial radio.

Moreover, if radio broadcasters step up to the plate and implement their own terrestrial DARS system, they can improve promise of a digital audio system for free over-the-air radio is tremendous; its possibilities limited only by the remarkable ingenuity of broadcasters. I therefore pledge to work with broadcasters to implement, as expeditiously as possible, a terrestrial DARS system. I will then sit back during my golden years (if they ever arrive) and watch the industry that is a part of me thrive as never before.

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SEPARATE STATEMENT

OF

COMMISSIONER ANDREW C. BARRETT

Re: In the Matter of Amendment of the Commission's Rules with Regard to the Establishment and Regulation of New Digital Audio Radio Services, Report and Order (GEN Docket No. 90-357)

Today, the Commission allocates spectrum in the 2310-2360 MHz band for satellite digital audio radio services (DARS). In doing so, the Commission has taken an important step in encouraging the advancement of a technology that promises the proliferation of multi-channel, multi-format digital radio services to unserved and underserved communities in this country. Therefore, I support this decision.

My support of the Commission's decision, however, is not without reservation. For years, terrestrial radio broadcasters have contributed valuable community-based programming at no cost to listeners. I am concerned about the potential adverse impact on localism and the possible economic harm to these broadcasters that may result from the introduction of DARS into the marketplace. While the Commission has an obligation to further the equitable distribution of radio service, I believe that we also have an obligation to carefully evaluate the risk of economic harm that DARS may present to existing terrestrial radio, and ultimately, to local radio service. To that end, I will review with interest additional information or studies which may be submitted to the Commission on this subject.

Finally, the Commission has recognized that competition benefits consumers. Therefore, I am pleased that the Commission will act expeditiously to modify its rules at such time as the existing radio broadcasters are able to determine a viable technology that will implement digital broadcasting within the current AM and FM allocations. To that same end, I will closely follow the service and licensing rulemakings for the new satellite DARS.

SEPARATE STATEMENT
OF
COMMISSIONER SUSAN NESS

Re: *Digital Audio Radio Services (Docket No. 90-357)*

This Report and Order is the first step toward establishing a nationwide digital audio programming service to be delivered by satellite directly to the American public in their homes and automobiles. By this action, we are allocating at the domestic level the spectrum we fought for and received on the international level at the World Administrative Radio Conference in 1992 (WARC-92). It is a necessary step, which I fully support.

The proponents of satellite-delivered broadcasting offer the prospect of new and unique programming being made available through both subscription and advertiser-supported radio services throughout the country, including rural areas. For example, they propose to deliver narrowly focused niche services, such as ethnic and foreign language programs, which may attract a critical mass of audience nationally, but may not otherwise be economically feasible to broadcast on a market by market basis. Satellite-delivered programming will reach rural areas of the country that may currently have limited terrestrial signal coverage. Finally, DARS advances technology, by making availabile compact disk quality sound, through a tiny disk-shaped dish that can be installed in the car or home.

The next step for the Commission is to consider licensing and service rules for satellite-delivered programming. In this upcoming proceeding I look forward to a full discussion of the pertinent issues. There will be many questions to address. Central to the debate will be the impact -- little or large -- of national, satellite-based broadcasting upon our existing and highly competitive free, over-the-air AM and FM broadcast service. I would expect to see well-researched economic data presented

for the record. Through our service rules I would hope to maximize the new and unique benefits from this service for the consumer while minimizing the negative repercussions, if any, it might have on the local radio broadcasting service -- an industry which has contributed greatly to the health and vitality of our local communities.

Among the issues to be addressed in the next proceeding will be the scope and nature of such services as well as the number of individual channels awarded each licensee and the procedure for assigning these licenses. I look forward to a discussion of whether the traditional broadcast regulatory scheme should apply to satellite providers, including any public interest or carriage obligations. I also will be exploring in our service rules ways to reconcile the public policy rationale for national and local limitations on radio broadcast ownership -- which we reaffirmed just two months ago -- with the potential for each DARS licensee to provide 30 to 50 channels of programming to our 260-plus markets.

In the broader context of considering the program delivery marketplace that will include the future satellite-delivered services as well as the current terrestrial-delivered services, I believe that it is in the public interest to facilitate use of digital technologies to improve the quality of existing services. Experiments are being conducted to test new broadcast systems designed to accommodate digital broadcasting within the existing AM and FM bands. I await these test results, and will work to address our AM and FM broadcast rules expeditiously if these tests are successful.

Our free, over-the-air broadcast system is being studied and cloned around the world as governments that once believed in strict control over broadcasting have come to appreciate its vitality. The underpinning of our system is technology transparent -- its attraction is in service to the local community, whether it is conveyed by something called amplitude modulation (AM), frequency modulation (FM), or digital audio. I

support our current local broadcast system and hope that our actions today will expedite the radio broadcasting industry's move to digital technologies.

Expanding the audio broadcast market to include programming delivered by satellite, as well as terrestrial broadcasting, has the potential to greatly enrich the programming choices available to the public. I look forward to both services competing with a variety of local and national digital quality programming.

SEPARATE STATEMENT OF

COMMISSIONER RACHELLE B. CHONG

Re: Amendment of the Commission's Rules with Regard to the Establishment and Regulation of New Digital Audio Radio Services, Gen. Doc. No. 90-357

It is with great pleasure that I support the important step the Commission has taken today towards making Satellite Digital Audio Radio Service ("DARS") a reality. Section 151 of the Communications Act of 1934 mandates that this Commission make available a rapid, efficient, nation-wide communications service. I believe that allocation of this spectrum to this exciting new satellite technology fulfills this important mandate.

There are many benefits that will flow from this new satellite radio service. Digital technology will produce a better quality sound for listeners and make more efficient use of the spectrum. Moreover, satellite delivery of radio programming will permit service to areas that are underserved or currently not served at all. Again, this serves our overarching goal of ensuring a nation-wide service.

I want to make clear that my support for satellite DARS in no way diminishes my support for terrestrial broadcast service. I view satellite DARS as a complementary service to terrestrial broadcasting that will increase the diversity of programming available to the public and increase radio listenership in general.

A factor important in my decision to support satellite DARS is the fact that this service will have a *nationwide* or *regional* audience base, and offer a broad panoply of channel choices. DARS operators will be free to target their programming at audiences that may be currently underserved such as special interests or ethnic or racial groups that might not be large enough in a traditional broadcast community to support particularized programming. For example, operators might offer specialized programming targeted to foreign language communities such as those who speak Vietnamese or Armenian. This programming could help bind such a community together on a national basis. Satellite DARS operators also could offer programming to hobbyists such as American history buffs. This will add more diversity to the daily fare contained on our airwaves.

I recognize that there are some parties in this proceeding who fear the advent of satellite DARS and predict that it will diminish the viability of local broadcasters. I hope that these parties have continuing faith in their success in the marketplace and will not give into their fears. Incumbent broadcasters have many strengths that will allow them to compete with satellite delivery systems. The primary strengths of terrestrial broadcasters have always been their devotion to the needs of the local community and their many

public service achievements. They will continue to receive the support of local sponsors if they capitalize on their strengths. I also encourage continued efforts toward authorizing current radio broadcasters to implement terrestrial digital radio service.

Finally, I encourage my fellow Commissioners to commit with me to take the remaining regulatory steps necessary to bring satellite digital radio service on line. This first step has been a long time coming. The first request for this spectrum allocation was filed almost five years ago in May 1990. Surely, we can pick up the regulatory pace and bring the many benefits this service holds to the American people expeditiously. We cannot allow our regulatory processes to hold back a worthy new technology.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMMUNITY TV CORPORATION

Appeal of Local Rate Order
of the Town of Gilford, NH

ORDER

Adopted: February 3, 1995; Released: February 6, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Community TV Corporation ("Community"), the franchisee in the above matter, filed on August 17, 1994 an appeal of the local rate order adopted on July 18, 1994 by its local franchising authority, the Town of Gilford, New Hampshire ("Gilford").[1] The rate order established a new regulated rate schedule for Community's basic service tier rates as well as for its cable programming service tier rates and for associated equipment.[2] Gilford's rate order requires Community to implement certain rate reductions and to issue refunds to subscribers, dating back to September 1, 1993.

2. In its appeal, Community argues that Gilford does not have the authority to regulate Community's cable programming service tier rates and that Gilford improperly calculated Community's refund liability by neglecting to reduce that liability, which was due to Community's overcharges for basic service, additional outlet charges, and remote control rentals, by the amount of Community's undercharges for addressable converters.

3. Under our rules, rate orders made by local franchising authorities may be appealed to the Commission.[3] In ruling on appeals of local rate orders, the Commission will not conduct a *de novo* review, but instead will sustain the franchising authority's decision as long as there is a reasonable basis for that decision.[4] Therefore, the Commission will reverse a franchising authority's decision only if it determines that the franchising authority acted unreasonably in applying the Commission's rules in rendering its local rate order.[5] If the Commission reverses a franchising authority's decision, it will not substitute its own decision but instead will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission's decision on appeal.[6]

II. DISCUSSION

A. Regulation of Cable Programming Services

4. Regulation of cable rates is conducted by either the Commission or by the state and local authorities depending on the tier of service involved.[7] The basic service tier is the tier of service which includes, at a minimum, the local broadcast channels along with any public, education, and governmental channels.[8] There can only be one basic service tier offered to a subscriber, but there can be more than one cable programming service tier.[9] Cable programming service tiers are tiers of service which include all video programming distributed over the system that is not on the basic service tier and that is not offered on a per channel or per programming basis.[10] The basic service tier and associated equipment are subject to regulation by the local franchising authority, upon certification by the Commission.[11] Regulation of cable programming service tiers is conducted by the Commission.[12]

5. After reviewing Community's Form 393, Gilford established a schedule of rates for both the basic service tier and the cable programming service tier, and ordered corresponding refunds. In an August 8, 1994 letter to Community, Gilford characterized the jurisdictional distinction between basic and cable programming service tiers as a "technical procedure" and warned that by refusing to refund cable programming charges Community would be

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[1] Along with its appeal of the local rate order, Community also filed a Request for Emergency Stay on August 17, 1994. On November 7, 1994, Gilford informed Commission staff that Gilford was not filing a formal opposition to the stay or the appeal, but, instead would rely on an August 8, 1994 letter to Community in which Gilford refused to amend its rate order to omit the portions concerning Community's cable programming service tier rates and instructed Community to provide a detailed explanation for failing to comply completely with the rate order. Because we are resolving this dispute on the merits presented in the appeal, the Request for Emergency Stay has been rendered moot.

[2] Community identifies its basic service and cable programming service tiers as "Basic Service" and "Expanded Basic Service". Under the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment. *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), 47 U.S.C. § 543(b).

[3] 47 C.F.R. § 76.944.

[4] *See Report and Order and Further Notice of Proposed Rulemaking in MM Docket* 92-266, 8 FCC Rcd 5631, 5731 (released May 3, 1993) *("Report and Order"); Third Order on Reconsideration in MM Docket* 92-266, 9 FCC Rcd 4316, 4341 (released March 30, 1994) *("Third Recon. Order").*

[5] *Id.*

[6] *Id.*

[7] Communications Act, § 623(a).

[8] *See Report and Order* at 5637.

[9] *Id* at 5744.

[10] *Id* at 5637.

[11] Communications Act, § 623(a)(2)(A). The Commission may regulate the basic service tier and associated equipment of a cable system not subject to effective competition upon the denial or revocation of a local franchising authority's certification or upon request of the local authority if it is unable to meet certification standards. 47 C.F.R. § 76.913.

[12] Communications Act, § 623(a)(2)(B). *See also Report and Order and Further Notice of Proposed Rulemaking* at 5834.

categorized as "nonresponsive and oblivious to the public it serves."[13] Gilford further instructed Community that, if it did not comply with that portion of the rate order dealing with the cable programming service tier, Community should comply with the remainder of the rate order and provide its basis for failing to comply completely.[14]

6. Although the Commission will uphold the decisions of franchising authorities if there is a reasonable basis for doing so, the Commission also must enforce the regulatory framework we have adopted pursuant to the 1992 Cable Act.[15] As a local franchising authority, Gilford does not have authority to regulate Community's cable programming service tier rates or order refunds for its cable programming service tier. If Gilford believed that Community had exceeded its maximum permitted rate for cable programming service, its proper course of action was to have filed a FCC Form 329 rate complaint with the Commission.[16] Gilford overstepped the bounds of its authority when it prescribed rates for Community's cable programming service tier and should have limited its decision to rates for the basic service tier and associated equipment. Therefore, we are remanding this issue to Gilford with instructions to enter a ruling consistent with these findings.

B. Calculation of Refunds

7. Community also appealed Gilford's rate order on the ground that Gilford did not offset against its maximum permitted basic service rates the charges it levies for addressable converters, which were below permitted levels. During the period under review, Community provided its subscribers with addressable converters free of charge. After determining the maximum rates that an operator is permitted to charge on a prospective basis, a franchising authority should then determine if the operator is liable for any subscriber refunds. Refund liability may be imposed when an operator's actual charges exceed maximum permitted levels during the applicable period of review. An operator's refund liability is calculated by comparing the aggregate revenues generated by its actual rates with the aggregate revenues that would have been generated by its permitted rates during the period of review.[17] If an operator's aggregate revenues computed from its actual rates exceed its revenues computed from its permitted rates during the period of review, the operator must refund the difference to subscribers. If the operator's aggregate revenues computed from its permitted rates exceed its aggregate revenues computed from its actual rates, the operator will not be required to issue any refunds for that period of review. Any refunds to be paid by Community should be calculated based on this method.

8. While the Commission will sustain the decisions of franchising authorities if there is a reasonable basis for doing so, we expect franchising authorities to adhere to the mathematical principles underlying the benchmark methodology, particularly when calculating an operator's refund liability.[18] For instance, in this case, Gilford must offset or reduce any refunds it may order by the difference between the actual equipment rates that Community charged and the maximum permitted rates that it could have charged during the period of review.[19] We are remanding this case to Gilford so that it can enter a ruling consistent with these findings.

III. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED that Community TV Corporations's appeal of the Town of Gilford's local rate order, regarding the issues of Community TV's cable programming service tier rates and permitted charges for converter boxes and related refunds is REMANDED to the local franchising authority for resolution in accordance with the terms of this Order.

10. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[13] *August 8, 1994 letter from Gilford of Gilford to Community TV.*

[14] *Id.*

[15] *See* Communications Act, § 623(a)(2).

[16] *See* Communications Act, § 623(c); *see also* 47 C.F.R. §§ 76.950 and 76.951.

[17] *See Third Recon. Order* at 4353 ("Although maximum permitted rates are always determined on an unbundled basis, ie. separately for program service and equipment, refund liability may stem from bundled rates. We conclude that the refund liability should be calculated based on the difference between old bundled rates and the sum of the new unbundled program service charge(s) and the new unbundled equipment charges(s).").

[18] *See Report and Order* at 5731; *Third Recon. Order* at 4346.

[19] *See Third Recon. Order* at 4353. *See also TCI Cablevision of North Central Kentucky, Inc.* DA 94-1479 (released December 14, 1994).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMMUNITY TV CORPORATION

Appeal of Local Rate Order
of the Town of New Durham, NH

ORDER

Adopted: February 3, 1995; Released: February 6, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Community TV Corporation ("Community"), the franchisee in the above matter, filed on October 14, 1994 an appeal of the local rate order adopted on September 14, 1994 by its local franchising authority, the Town of New Durham, New Hampshire ("New Durham").[1] New Durham has not filed any opposition to Community's appeal. The rate order established a new regulated rate schedule for Community's basic service tier rates as well as for its cable programming service tier rates and for associated equipment.[2] New Durham's rate order required Community to implement certain rate reductions and to issue refunds to subscribers, dating back to September 1, 1993.

2. In its appeal, Community first argues that New Durham does not have the authority to regulate Community's cable programming service tier rates. As support for its contention, Community notes that the 1992 Cable Act limits the jurisdiction of local franchising authorities to the regulation of basic service tier rates and associated equipment.

3. Community also argues that New Durham issued its rate order regarding Community's Form 393 before New Durham completed the collection of data it had requested of Community.[3] Specifically, on July 5, 1994, New Durham advised Community that it was extending its initial 30-day review period by an additional ninety days. On August 30, 1994, New Durham told Community that it would be accepting public comment on the "reasonableness" of Community's basic service tier rates and equipment and installation rates through October 3, 1994. On September 14, 1994, the same day that New Durham issued its rate order, it issued a letter requesting clarification of Community's calculation of its benchmark rate, its number of channels on both the basic service and cable programming service tiers, and several other items on Community's Form 393. Thus, Community asserts that the local franchising authority never fully considered all available data before issuing its order.

4. Under our rules, the Commission hears appeals of local rate orders issued by local franchising authorities on whether the franchising authorities have acted in a manner consistent with the 1992 Cable Act and our rules.[4] Appeals on local or state matters, such as whether a franchising authority has complied with local procedures on pleading cycles or hearings, should be heard by local or state courts.[5] In hearing appeals of local rate orders on matters subject to our jurisdiction, the Commission will not conduct a *de novo* review, but instead will sustain the franchising authority's decision as long as there is a reasonable basis for that decision.[6] Therefore, the Commission will reverse a franchising authority's decision only if it determines that the franchising authority acted unreasonably in applying the Commission's rules in rendering its local rate order.[7] If the Commission reverses a franchising authority's decision, it will not substitute its own decision but instead will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission's decision on appeal.[8]

II. DISCUSSION

A. Cable Programming Rates

5. Regulation of cable rates is conducted by either the Commission or by the state and local authorities depending on the tier of service involved.[9] The basic service tier is the tier of service which includes, at a minimum, the local broadcast channels along with any public, education, and governmental channels.[10] There can only be one basic service tier offered to a subscriber, but there can be more than one cable programming service tier.[11] Cable programming service tiers are tiers of service which include all video programming distributed over the system that is not on the basic service tier and that is not offered on a per

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[1] Along with its Appeal of Local Rate Order, Community also filed a Request for Emergency Stay on October 14, 1994. New Durham did not oppose the stay petition. Because we are resolving this dispute on the merits presented in the appeal, the Request for Emergency Stay has been rendered moot.

[2] Community identifies its basic service and cable programming service tiers as "Basic Service" and "Expanded Basic Service". Under the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment. *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), 47 U.S.C. § 543(b).

[3] The Commission's Form 393 ("Determination of Maximum Initial Permitted Rates For Regulated Cable Programming Services and Equipment") directs a cable operator to determine its maximum permitted rates for regulated service, equipment, and installations.

[4] 47 C.F.R. § 76.944.

[5] *See* 47 C.F.R. 76.944(a); *see also Report and Order and Further Notice of Proposed Rulemaking in MM Docket* 92-266, 8 FCC Rcd 5631, 5729, n.388 (released May 3, 1993) *("Report and Order"); Third Order on Reconsideration in MM Docket* 92-266, 9 FCC Rcd 4316, 4341 (released March 30, 1994) *("Third Recon. Order")*.

[6] *See Report and Order* at 5731 and *Third Recon. Order* at 4346.

[7] *Id.*

[8] *Id.*

[9] Communications Act, § 623(a).

[10] *See Report and Order* at 5637.

[11] *Id* at 5744.

channel or per programming basis.[12] The basic service tier and associated equipment are subject to regulation by the local franchising authority, upon certification by the Commission.[13] Regulation of cable programming service tiers isp conducted by the Commission.[14]

6. After reviewing Community's Form 393, New Durham established a schedule of rates for both the basic service tier and the cable programming service tier, and ordered corresponding refunds.[15] Although the Commission will uphold the decisions of franchising authorities if there is a reasonable basis for doing so, the Commission also must enforce the regulatory framework we have adopted pursuant to the 1992 Cable Act.[16] As a local franchising authority, New Durham does not have the authority to regulate Community's cable programming service tier rates or order refunds for its cable programming service tier. If New Durham believed that Community's cable programming service tier rate exceeded its maximum permitted rate, its proper course of action was to have filed a FCC Form 329 rate complaint with the Commission.[17] New Durham overstepped the bounds of its authority when it prescribed rates for Community's cable programming service tier. It should have limited its decision to rates for the basic service tier and associated equipment. Therefore, we are remanding this issue to New Durham with instructions to enter a ruling consistent with these findings.

B. Timing of New Durham's Rate Order

7. Community does not challenge New Durham's application of our procedural rules regarding franchising authorities' time periods for review of existing cable rates.[18] Instead, Community contends that New Durham acted unreasonably in applying its own notice and comment rules.[19] As support for its contention, Community notes that, prior to the expiration of the public comment period established by New Durham, the local franchising authority simultaneously issued its rate order and a request for clarification regarding certain items on its Form 393.[20] Community's complaint stems from New Durham's failure to comply with its own procedures regarding public comment and the solicitation of additional information. The resolution of this issue requires an interpretation of applicable local law and not federal law; thus, a state or local court is the appropriate forum to hear this matter.[21]

III. ORDERING CLAUSES

8. IT IS ORDERED that Community TV Corporations's appeal of the Town of New Durham's local rate order, regarding the issue of Community TV's cable programming service tier rates is REMANDED to the local franchising authority for resolution in accordance with the terms of this Order.

9. Accordingly, IT IS FURTHER ORDERED that Community TV Corporations's appeal of the Town of New Durham's local rate order, regarding the issue of New Durham's issuance of its rate order prior to the completion of the collection of data that it had requested from Community is DISMISSED.

10. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[12] *Id* at 5637.

[13] Communications Act, § 623(a)(2)(A). The Commission may regulate the basic service tier and associated equipment of a cable system not subject to effective competition upon the denial or revocation of a local franchising authority's certification or upon request of the local authority if it is unable to meet certification standards. 47 C.F.R. § 76.913.

[14] Communications Act, § 623(a)(2)(B). *See also Report and Order and Further Notice of Proposed Rulemaking* at 5834.

[15] New Durham obviously was aware of the jurisdictional division between the local franchising authorities and the Commission. On the same day that it issued the rate order, New Durham filed a FCC Form 329 complaint with the Commission alleging that channels were added to Community's cable programming service tier.

[16] *See* Communications Act, § 623(a)(2).

[17] *See* Communications Act, § 623(c); *see also* 47 C.F.R.§§ 76.950 and 76.951.

[18] 47 C.F.R. § 76.933. A franchising authority has 30 days to review a cable operator's existing rates unless the franchising authority issues a tolling order extending the review period for an additional 90 days in cases not involving cost of service or an additional 150 days for cases involving cost of service showings. *See Report and Order* at 5716 ("We thus believe that franchising authorities can decide for themselves whether and when to conduct formal or informal hearings as long as they act on rate cases within the prescribed time periods we have established and provide interested parties with notice and a meaningful opportunity to participate. Consequently, we will not adopt a federal rule to govern this issue.")

[19] Neither party has provided a description of New Durham's local rules.

[20] *See supra* ¶ 3.

[21] *See* 47 C.F.R. 76.944(a); *see also Third Recon.* at 4341 and *Report and Order* at 5729, n.388 ("Appeals of local rate decisions that do not depend upon determining whether a franchising authority has acted consistently with the Cable Act or the Commission's Rules could be heard in state or local courts. For example, a state court could hear an appeal on whether a franchising authority compiled with its local procedures on pleading cycles or hearings....")

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Transmittal No. 2265

Revisions to Tariff F.C.C. No. 15,
Competitive Pricing Plans 4 and 5

MEMORANDUM OPINION AND ORDER

Adopted: January 26, 1995; Released: February 2, 1995

By the Commission:

I. INTRODUCTION AND BACKGROUND

1. On May 2, 1990, American Telephone and Telegraph Company (AT&T) filed Transmittal No. 2265 to introduce a credit plan for customers of Competitive Pricing Plans (CPPs) 4 and 5.[1] By Transmittal No. 2265, AT&T would have provided credits to customers for delays in implementing CPPs 4 or 5 for reasons not caused by the customer, and would have decreased the term of the CPP when such credits were applied.

2. The Common Carrier Bureau (Bureau) rejected Transmittal No. 2265 on the ground that it violated Section 61.38 of the Commission's Rules, 47 C.F.R. § 61.38.[2] Section 61.38 requires carriers to supply economic information to support changed or new tariff matter. AT&T, however, merely resubmitted the cost information that it originally had filed with CPPs 4 and 5, Transmittal Nos. 2185 and 2233, respectively, stating that the proposed credits had no economic impact and did not change the original projections of demand, cost and revenues.

3. On August 29, 1990, AT&T filed an application for review of the *Tr. 2265 Rejection Order*. On September 13, 1990, the Competitive Telecommunications Association (CompTel), the National Telecommunications Network (NTN), and US Sprint Communications Company Limited Partnership (Sprint) filed oppositions to AT&T's application for review, while MCI Telecommunications Corporation (MCI) filed its opposition on September 14, 1990.[3] AT&T filed its reply on September 26, 1990. For the reasons discussed below, we grant AT&T's application for review.

II. DISCUSSION

4. AT&T, by Transmittal No. 2087, previously sought to introduce the Tariff Assurance Policy (TAP) as a provision in the Tariff 15 general regulations.[4] TAP would have provided a credit to any customer accepting a Tariff 15 Competitive Pricing Plan (CPP) that the Commission suspended but later allowed to become effective. The one-time credit would have equaled the discounted rate the customer would have received had the tariff not been suspended. According to AT&T, the credit was based on the customer's actual usage within the suspension period of the CPP. In addition, AT&T would have reduced any term requirement in a CPP to which the TAP applied by the amount of time within the suspension period that the customer used the non-discounted service. A number of carriers filed petitions against Transmittal No. 2087, and AT&T filed Transmittal No. 2265 to withdraw it.

5. Transmittal No. 2265, however, introduced a modified form of TAP, limited to CPP 4 and CPP 5, which would have provided credits for delays in implementing service for reasons not caused by the customer, and would have decreased the term of the CPP when such credits were applied by a time period equal to the period of actual service before the discounted CPP 4 or CPP 5 rates were in effect. The transmittal would thus have provided customers of CPP 4 and CPP 5 with credits for the discounts they would have received had the CPP not been delayed and would have shortened their CPP terms in proportion to the time period during which they took undiscounted service.

6. According to AT&T, the Bureau's decision in Transmittal No. 2265 is based on an erroneous finding of fact and conflicts with precedent and established Commission policy. AT&T Application at 1. AT&T claims that the financial effects of the credit and the reduction in term commitment established by Transmittal No. 2265 are completely offset by the customer's payment of nondiscounted rates for its existing service (equal to the amount of the credit) for the period during which its conversion to CPP 4 or 5 is delayed (equal to the reduction in term). *Id.* at 5. For this reason, argues AT&T, if implementation of CPPs 4 or 5 was delayed, the economic impact on customers and AT&T was the same as if no delay occurred, and projections of demand, cost, and revenues were unchanged from the original filings introducing CPPs 4 and 5. *Id.* at 2-3. Therefore, AT&T asserts, Transmittal No. 2265 substantially complied with the requirements of Section 61.38. *Id.* at 5-6, citing *Municipal Light Boards v. Federal Power Commission*, 450 F.2d 1341, 1345-46 (D.C. Cir. 1980)(*Municipal*).

7. All of the parties opposing AT&T's application for review believe that the Bureau properly rejected Transmit-

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[1] According to AT&T, CPPs are offerings under AT&T's Tariff 15 that are designed to respond to discounts offered by competing carriers. CPP 4 provides discounts on Software Defined Network (SDN) Service; CPP 5 provided SDN Service for a one-year term which ended December 16, 1991.

[2] AT&T Communications, Tariff F.C.C. No. 15, Transmittal No. 2265, 5 FCC Rcd 5262 (Com. Car. Bur. 1990) (*Tr. 2265 Rejection Order*).

[3] MCI accompanied its application with a motion to accept its late-filed pleading. MCI states that it inadvertently filed its opposition one day late, and that it hand-delivered a copy of its opposition to AT&T's Washington, D.C. offices the day after it was due. We conclude that inadvertence is insufficient reason to accept MCI's late filing.

[4] AT&T Communications Tariff F.C.C. No. 15, Transmittal No. 2087, at First Revised Page 14.1.1, Section 2.1.10, cancelled by Transmittal No. 2265. AT&T established Tariff 15 to provide customer specific discounts from the rates in its general tariffs. According to AT&T, each CPP offers one or more of AT&T's tariffed telecommunications services to a single named customer at reduced rates that equal or exceed the rates offered to that specific customer by a competitor.

tal No. 2265 for lack of Section 61.38 cost support.[5] CompTel notes that the *Municipal* case that AT&T cites to support its contention that rejection is appropriate only for major violations stands for the opposite proposition. CompTel Opposition at 5. CompTel further argues that because customer usage levels often differ sharply from month-to-month, it is almost impossible for application of the credit formulae to produce charges identical to those that would have applied had the filing been allowed to take effect without delay. *Id.* at 7. NTN argues that because the credit arrangement would provide each customer with, in effect, free service in the first month the offering became effective, and because there is no cap on the service charges to which credits apply, there could be a burst of customer use far beyond that anticipated in AT&T's original cost justification for CPPs 4 and 5.[6] NTN Opposition at 6-7.

8. Section 61.38 of the rules requires, among other things, that a carrier submit economic information to support changed or new tariff matter. Although AT&T resubmitted the same cost support figures that it originally filed with CPP 4 and CPP 5, it also explained in the transmittal letter why the proposed credits had no economic impact and did not change the original projections of demand, cost and revenues. Transmittal No. 2265 therefore did not violate Section 61.38 on its face. Because AT&T technically complied with Section 61.38 of the rules, Transmittal No. 2265, as filed, was not patently unlawful. Therefore, the Bureau improperly rejected the tariff and its decision is reversed.[7]

III. CONCLUSION AND ORDERING CLAUSES

9. Accordingly, IT IS ORDERED that the application for review filed by American Telephone and Telegraph Company IS GRANTED.

10. IT IS FURTHER ORDERED that the motion to accept a late-filed pleading filed by MCI Telecommunications Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[5] CompTel, NTN and Sprint also argue that there were other reasons for the Bureau to reject Transmittal No. 2265. We do not address these other arguments, or AT&T's response to them, because the Bureau rejected Transmittal No. 2265 strictly for violating Section 61.38.

[6] *See also* Sprint Opposition at 3.

[7] We do not address the validity or sufficiency of the cost information AT&T resubmitted as part of Transmittal No. 2265. Any material questions of fact involving that information properly should have been resolved in an investigation of the transmittal.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Loral/Qualcomm Partnership, L.P.

File Nos. 19-DSS-P-91(48)
CSS-91-014
21-SAT-MISC-95

For Authority to Construct, Launch, and Operate Globalstar, a Low Earth Orbit Satellite System to Provide Mobile Satellite Services in the 1610-1626.5 MHz/2483.5-2500 MHz Bands

ORDER AND AUTHORIZATION

Adopted: January 31, 1995; Released: January 31, 1995

By the Chief, International Bureau:

I. INTRODUCTION

1. Loral/Qualcomm Partnership, L.P. ("LQP") filed an application[1] to construct, launch, and operate a low-Earth orbit ("LEO") mobile satellite system in the 1.6/2.4 GHz frequency bands ("Big LEO" service).[2] On November 15, 1994, LQP amended its application in light of the rules and policies adopted by the Commission to govern "Big LEO" service.[3] By Public Notice, Report No. DS-1481 (November 21, 1994), we sought comment on LQP's amended application. AMSC filed a Petition to Defer Processing, Constellation filed Consolidated Comments, MCHI filed a Consolidated Petition to Deny, Motorola filed Consolidated Comments and Petition to Defer and/or Deny, and TRW filed a Petition to Deny. MCHI filed Comments in Support of Opposition to LQP Request for Waiver of Power Flux Density Limits, and LQP filed a Consolidated Response and letter responding to MCHI's Comments in Support of Opposition to LQP Request for Waiver of Power Flux Density Limits. MCHI and TRW filed Consolidated Replies. LQP filed a letter opposing TRW's Consolidated Reply. For the reasons discussed below, we grant LQP's application, as amended, subject to certain conditions.[4]

2. LQP is a Delaware limited partnership whose sole general partner is Loral General Partner, Inc. (LGP). LGP is indirectly 100% owned by Loral Corporation. LGP owns 51% of the LQP partnership interests. It directly holds 2%, while 49% is held by Loral Globalstar, L.P., a Delaware limited partnership wholly owned by LGP. Qualcomm Limited Partner, Inc., wholly owned by Qualcomm Incorporated, owns the other 49% of the LQP partnership interest.

3. LQP proposes to construct, launch, and operate a satellite system called Globalstar consisting of 48 operational, non-geostationary satellites and eight in-orbit spares. The 48 operational satellites would orbit the earth in a circular orbit at an altitude of 1,414 kilometers. Six satellites spaced at 60 degree intervals will occupy each of eight orbital planes at an inclination of 52 degrees with a 45 degree separation between planes. LQP proposes to provide mobile voice, data, facsimile, position location, and other mobile satellite services ("MSS") for both domestic and international subscribers.

4. LQP requests feeder links in the 5025-5225 MHz (uplink) and 6875-7075 MHz (downlink) frequency bands. It acknowledges that it may be required to share these frequencies with other geostationary or non-geostationary satellite systems. It also requests a waiver of the power flux density limit in the 2483.5-2500 MHz mobile satellite service band.

II. DISCUSSION

5. *Financial Qualifications.* Applicants for space station authorizations in the Big LEO service must demonstrate the financial qualifications set forth in Section 25.143(b)(3) of the Commission's rules.[5] Specifically, an applicant must demonstrate that it has the financial resources to meet the estimated costs of the construction, launch, and first-year operation for the satellite system. This can be demonstrated through evidence of the company's current assets, operating revenues, or irrevocably committed debt or equity financing. If it is relying on internal funds, an applicant must also provide evidence of a management commitment.

6. To demonstrate its financial qualifications, LQP relies on the financial resources of its ultimate majority owner, Loral Corporation. LQP estimates that its costs to build and launch the 56 satellites in this system, and to operate the system for one year after the launch of the first satellite, will be approximately $1.554 billion. LQP reports that Loral Corporation has current assets of $1.8 billion and operating income of $400 million. LQP provides a letter from Michael B. Targoff, Loral Corporation's Senior Vice President and Secretary, stating that, absent a material

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[1] The original application was filed on June 3, 1991 by Loral Cellular Systems Corp. AMSC Subsidiary Corporation ("AMSC"), Mobile Communications Holdings, Inc. ("MCHI") and Motorola Satellite Communications, Inc. ("Motorola") filed Petitions to Deny. The Communications Satellite Corporation, TRW Inc. ("TRW"), and Constellation Communications, Inc. ("Constellation") filed comments. LQP filed a responsive pleading. The matters raised in those petitions and comments have, except as addressed in this *Order*, been separately addressed through the adoption of service rules for Big LEO systems, or have otherwise been rendered moot through amendments to LQP's application.

[2] LQP requests authority to construct a mobile satellite system capable of operating in the 1610.0 - 1626.5/2483.5 - 2500 MHz frequency bands and to operate the system in the United States in the 1610.0 - 1621.35/2483.5 - 2500 MHz frequency bands. *See* LQP Amendment (Nov. 15, 1994), at 29.

[3] Amendment of the Commission's Rules to Establish Rules and Policies Pertaining to a Mobile Satellite Service in the 1610-1626.5/2483.5-2500 MHz Frequency Bands, 9 F.C.C. Rcd. 5936 (1994) ("Big LEO Order").

[4] If it becomes necessary to implement our interim spectrum sharing plan, code division multiple access ("CDMA") operators will have the option of operating in the 1612-1622.60 MHz frequency bands in addition to the 2483.5-2500 MHz frequency bands for the duration of the interim plan. *See* Big LEO Order at ¶ 53.

[5] 47 C.F.R. § 25.143(b)(3).

change in circumstances, Loral Corporation is "fully committed" to expending the necessary funds, or to taking all reasonable steps to cause LQP to raise and expend the necessary funds, to finance the construction, launch, and operation of the Globalstar system for one year after the launch of the first satellite.[6]

7. TRW asserts that LQP has understated the cost of its proposed system by at least $856 million, and that as a consequence, the costs of construction, launch, and one year of operation exceed the current assets and operating income of Loral Corporation.[7] LQP responds that its cost projection is based on a firm, fixed-price contract awarded to Space Systems/Loral, Inc. ("SSL") to design, construct, and launch the Globalstar satellites.[8]

8. TRW has not presented any evidence that the SSL contract is not valid or that the contract does not cover the needed services. TRW merely uses independent, unrelated data to suggest that the projected costs are unrealistic. Thus, there is no reason to conclude that LQP's specifically contracted price is unreliable. Absent evidence of misrepresentation or patent implausibility, the Bureau is not in a position to question an applicants's cost projections.

9. AMSC, TRW, and MCHI allege that, even assuming LQP's cost estimates to be reasonable, LQP has failed to submit information sufficient to demonstrate its compliance with our financial requirements.[9] Specifically, they claim LQP cannot rely on the current assets and operating revenues of Loral Corporation because Loral Corporation states that it will "expend the necessary funds, *or* take all reasonable steps to cause LQP to raise and expend the necessary funds" (emphasis added). AMSC and MCHI assert, based on SEC filings, that Loral Corporation intends primarily to fund the system from external sources and not internal assets or income. They submit that, based on LQP's stated intent to seek external financing, it cannot reasonably claim at the same time to rely on internal funding. Therefore, they argue, the letter is insufficient, and LQP must submit evidence of ready external financing.[10] MCHI also argues that LQP's reliance on internal assets despite its intent to seek outside sources of funding calls its candor into question.[11]

10. In the *Big LEO Order*, the Commission stated that "[t]he availability of internal funds sufficient to cover a system's costs provides adequate assurance at the time the Commission acts on the application, that the system can be built and launched. Current assets provide a general measure of a company's ability to finance the project itself *or to raise funds from lenders and equity investors on the basis of its on-going operations*."[12] LQP has submitted adequate evidence to show that Loral Corporation has current assets and operating income sufficient to construct the system, and Loral Corporation has provided an unequivocal statement that it is prepared to expend the funds necessary to construct, launch, and operate the proposed system for one year. The Commission's rules and policies do not require more. We have also reviewed the alleged inconsistencies between LQP's statements to the Commission and its statements in SEC filings concerning its financing plans. We conclude that the statements are entirely consistent, and raise no substantial material question of fact that would require a hearing as to the applicant's candor.

11. Finally, MCHI asks the Commission to scrutinize whether a transfer of control of LQP has occurred. It further argues that LQP has created an ownership structure so complex that Loral Corporation may have been effectively insulated from Commission scrutiny, and that LQP may not be the appropriate applicant. MCHI maintains that LQP's complex ownership "labyrinth" must be examined at a hearing.[13] LQP replies that it has consistently kept the Commission apprised of changes in its ownership structure. It asserts that Loral Corporation maintains ultimate control of the applicant.[14]

12. In questioning LQP's "byzantine ownership structure," MCHI includes only one paragraph of vague accusations. We have already found LQP as currently structured to be financially qualified. We recognize that in the significant amount of time that has passed since the Big LEO applications were filed, LQP has made several revisions to its ownership structure. Several of the applicants in this new service, however, have altered their ownership structures over the course of this proceeding to take advantage of new financing possibilities. We recognize that some of these changes might be considered "major amendments" under Section 25.116 of the Commission's Rules,[15] jeopardizing eligibility for consideration in this processing group. However, our overriding concern in determining whether a "major amendment" has occurred is whether the applicant has attempted to profit from the sale of an application.[16] Unless there is evidence of this, we see no reason to prevent applicants from procuring partners to help finance the enormous cost of these systems. Regardless of whether there has been a transfer of control here, we find no intent to traffick in applications. Consequently, even if a "major" change in LQP's ownership has occurred, we find these ownership changes to be in the public interest pursuant to Section 25.116(c)(2) of the Commission's Rules, and we will not treat LQP's application as newly filed.[17]

13. *Technical Qualifications.* Applicants seeking authority to construct and launch Big LEO systems also must meet certain technical requirements. These requirements include: (1) using a non-geostationary system design; (2) providing mobile satellite service to all locations as far north as 70^0 latitude and as far south as 55^0 latitude for at least 75 percent of every 24-hour period; (3) providing continu-

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[6] LQP Consolidated Response to Petitions and Comments at attachment A.
[7] TRW Petition at 4-9.
[8] LQP Response at 12.
[9] AMSC Petition at 5; TRW Petition at 10; MCHI Petition at 20.
[10] AMSC Petition at 5-6; MCHI Petition at 20-22.
[11] MCHI Petition at 22.
[12] Big LEO Order at ¶ 31 (emphasis added).
[13] MCHI Petition at 22-23.
[14] LQP Response at 10-12.
[15] 47 C.F.R. § 25.116.
[16] In this regard, the Big LEO service differs from services in which multiple or cross-ownership rules may require closer review of ownership changes. Furthermore, the Big LEO applicants have each proposed to operate as private carriers. Thus, concerns about ownership changes that may violate Section 310(b) of the Communications Act are considerably diminished.
[17] The only amendment filed by LQP since the last public notice informed the Commission of a change in ownership that we find to be minor. LQP Amendment (Dec. 16, 1994).

ous service throughout the fifty states, Puerto Rico, and the U.S. Virgin Islands; and (4) preventing unacceptable interference to other authorized users of the spectrum.[18]

14. LQP states that the Globalstar satellites are non-geostationary and will provide continuous global coverage between 74 degrees north and 74 degrees south latitude, exceeding the requirements of our rules. Further, the Globalstar system will provide continuous service over the entire continental United States, Alaska, Hawaii, Puerto Rico, and the U.S. Virgin Islands. Finally, LQP says that the system is capable of providing the required protection for the Radio-Astronomy Service, Radio Navigation Satellite Service, Aeronautical Radio Navigation Service, and International Aeronautical Radio-Navigation Service.[19] No commenter has refuted any of these claims. We find that LQP's November 15, 1994 amendment has fulfilled all technical requirements of Section 25.143(b)(2) of the Commission's Rules.[20]

15. *Feeder Links.* LQP requests feeder links at 5025-5225 MHz (Earth-to-space) and 6875-7075 MHz (space-to-Earth). Motorola argues that LQP's amended request for feeder link frequencies constitutes a major amendment under Section 25.116 of our rules.[21] It claims that the amendment was not necessitated by the new policies and rules established in the *Big LEO Order,* and that it increases the potential for interference without resolving any frequency conflicts. Motorola also claims the amended request will decrease the likelihood that there will be enough spectrum available for all the qualified applicants in their desired feeder link bands, and that such requests will further delay unconditional licenses to Motorola and other system operators. In its Response, LQP states that the increase in bandwidth is directly necessitated by the *Big LEO Order,* which required band sharing and reduced the amount of service-link spectrum available for CDMA systems. The increase in the number of service beams needed to share spectrum with other CDMA systems translated into a direct need for increased feeder link spectrum, LQP states.

16. In the *Big LEO Order,* the Commission afforded applicants the opportunity to amend their applications to bring them into conformance with newly adopted requirements and policies for satellite systems. It noted, for example, that a change from a geostationary system configuration to a LEO configuration to meet our satellite system design requirement, or a change in coverage patterns to conform with our satellite visibility requirements, would not affect a particular application's status in the processing group. It also indicated, however, that "a change that is not necessary to bring the application into conformance with our rules *and* which would increase frequency conflicts" would render the application newly filed under Section 25.116 of the rules.[22] As an example, it stated that a design change from a CDMA to a TDMA/FDMA system, which would not facilitate spectrum sharing, would be a major amendment. Such applications would be considered in a future processing group, after January 1996.

17. LQP redesigned its system to facilitate the spectrum sharing plan adopted in the *Big LEO Order* by increasing the number of end users that can be served simultaneously. It appears that LQP's feeder link requests were a consequence of this redesign. Therefore, we do not believe the changes in LQP's feeder link proposal should be considered major. Furthermore, even if the amendment were considered major within the meaning of Section 25.116 of the Rules, we would waive its requirements in this case because (a) the modified system serves the public interest by increasing system capacity and spectrum-use-efficiency in the service links; (b) feeder link spectrum is for a use ancillary to the use of Big LEO spectrum; (c) the service is at a relatively early stage of development in which its spectrum requirements are still being addressed; and (d) any third parties who might be adversely affected by feeder link allocations will have a full opportunity to address potential interference concerns in other pending proceedings.[23] Accordingly, we decline to treat LQP's application as newly filed.

18. As stated in our *Big LEO Order,* we are not in a position to assign feeder link frequencies unconditionally to any applicant.[24] Therefore, we will grant qualified applicants the authority to construct, at their own risk, mobile satellite systems capable of operating on the feeder link frequencies they have requested. We believe this is the type of "conditional" license contemplated by the *Big LEO Order.*[25] We will defer acting on requests to launch and operate using specific feeder link frequencies until that spectrum is available to assignment to Big LEO feeder links, and sufficient spectrum is available to satisfy the feeder link requirements of all licensed Big LEO systems, regardless offrequency band.[26]

19. *Waiver Request.* LQP requests a waiver of Section 2.106 of the Commission's rules and International Radio Regulation ("RR") 753P to operate its service downlink in the 2.4 GHz band using power flux density (PFD) levels that exceed the levels contained in RR 2566. It states that Task Group 2-2, convened by the International Telecommunication Union to prepare for the upcoming World Radio Conference (WRC-95) to develop sharing criteria for radio services in the 1-3 GHz band, concluded that operation at higher PFD levels increases the capacity of MSS systems, while providing full protection to analog radio

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[18] 47 C.F.R. § 25.143(b)(2); 47 C.F.R. § 25.213.

[19] LQP Amendment (Nov. 15, 1994), at 24-28.

[20] We note that this license does not authorize MSS earth terminals or gateway earth terminals. Gateway earth stations will be licensed in accordance with technical requirements for the frequency band to be used. Standards are currently being developed to assure that MSS earth terminals, the Global Positioning System, and the Global Orbiting Navigation Satellite System can coexist in adjacent bands. *See* Memorandum of Understanding Between the FCC, NTIA and FAA, Public Notice 50736, November 19, 1994.

[21] 47 C.F.R. § 25.116.

[22] Big LEO Order at ¶ 59 (emphasis added).

[23] We note that the Commission has a number of issues related to the allocations of spectrum for Big LEO feeder links separately before it in several pending proceedings, including the 28 GHz Proceeding, (Second Notice of Proposed Rule Making in CC Docket No. 92-297), 9 F.C.C. Rcd. 1394 (1994), and Preparation for the World Radio Conference, (Notice of Inquiry in IC Docket No. 94-31), 9 F.C.C. Rcd. 2430 (1994).

[24] Big LEO Order at ¶ 166. Accordingly, we will not implement a construction milestone until authority to launch and operate a mobile satellite system using specific feeder link spectrum is granted. *Id.* at ¶ 189.

[25] Big LEO Order at ¶ 166.

[26] Big LEO Order at ¶ 166. We will afford permittees and applicants an opportunity to revise their requested feeder link bands, if necessary. Consistent with our usual practice, we will place any revised requests on public notice and will provide the public an opportunity to comment.

relay networks and only a slight operating loss to digital radio relay networks operating in the same band.[27] LQP says the we should permit these higher PFD levels at all elevation angles.

20. In response, Constellation notes that it and the other CDMA applicants have indicated that they would operate their systems at the PFD levels currently specified in RR 2566, but they would not object to a waiver at elevation angles between 10^0 and 25^0, provided that a waiver is also granted for all LEO systems operating in that band. MCHI argues that waivers should not apply to elevations above 25^0 because this would increase interference to the other applicants' systems, provide an unfair competitive advantage to LQP or, alternatively, require a major system redesign by MCHI.

21. As a general matter, the Commission does not grant waivers except on a specific factual demonstration that a waiver would further the public interest and Commission objectives. While an increase in the PFD limit may ultimately serve the public interest, granting a waiver to only one applicant might create the potential for harmful interference stemming from differing signal strengths and disparate noise levels. The rulemaking process, not the waiver procedure, is the more appropriate vehicle for changing a technical requirement that will affect all licensees.[28] We therefore will address the matter of revising the PFD limits in Section 2.106 in the pending reconsideration of the *Big LEO Order*. Accordingly, we deny LQP's request for a waiver of Section 2.106 of the Rules.

22. *Regulatory Treatment.* Pursuant to our discretion under Section 332(c)(5) of the Communications Act, we grant LQP's request that it be regulated as a non-common carrier.[29] As we determined in the *Big LEO Order*, Big LEO space station licensees providing service directly to end users must be regulated as common carriers if the service offering meets the definition of commercial mobile radio service ("CMRS").[30] If a Big LEO licensee, however, offers space segment capacity to a reseller or other entity who then offers CMRS to end users, we have the discretion to determine whether to require the licensee to offer such service on a common carriage basis or to permit the offering to be made on a private carriage basis.[31] We concluded in the *Big LEO Order* that there does not appear to be a need to impose common carrier requirements on Big LEO licensees offering space segment capacity to resellers.[32] LQP says that the Globalstar space segment will be offered on a contract basis to vendors who in turn will provide MSS services to subscribers and/or resell capacity to other service vendors. LQP does not intend to hold itself out to provide MSS service indifferently to the public.[33] We therefore will allow LQP to operate as a non-common carrier.

23. *Other Issues.* Finally, LQP reaffirms its request, already tentatively denied in the *Big LEO Allocation NPRM*, 7 F.C.C. Rcd. at 6420, for a pioneer's preference. LQP submits that the Commission should grant this request at the same time as LQP's space station authorization.[34] LQP's request for a pioneer's preference is being addressed in another proceeding. Our decision to issue LQP a license is both consistent with the Commission's desire to license Big LEO service expeditiously, and without prejudice to any action the Commission deems appropriate with respect to LQP's pioneer preference request.

24. *Effect of Decisions on Other Applications.* In orders released today, the Bureau defers action on the applications of MCHI and Constellation until January 1996. Based on the intraservice sharing plan adopted in the *Big LEO Order*, it may not be possible to grant all remaining applications for Big LEO licenses. Nonetheless, in granting LQP's application we insulate LQP from any mutual exclusivity that may arise among the remaining applicants. In other words, while LQP's license is conditional in some respects, it will not be affected in any way if the Commission determines that all three of the remaining applicants are qualified for the two remaining licenses that can be awarded for the currently available spectrum.

III. ORDERING CLAUSES

25. Accordingly, IT IS ORDERED that application file Nos. 19-DSS-P-91(48) and CSS-91-014 IS GRANTED, and Loral/Qualcomm Partnership, L.P., IS AUTHORIZED to construct a mobile satellite service system capable of operating in the 1610-1626.5/2483.5-2500 MHz frequency bands, in accordance with the technical specifications set forth in its application and consistent with our rules unless specifically waived herein.

26. IT IS FURTHER ORDERED that Loral/Qualcomm Partnership, L.P., IS AUTHORIZED to launch and operate 48 low-Earth orbiting space stations and eight in-orbit spares during the license term for the purpose of providing a mobile satellite service in the United States in the 1610-1621.35/2483.5-2500 MHz frequency bands in accordance with the technical specifications set forth in its applications and consistent with our rules unless specifically waived herein. In the event the 1610-1612 MHz band is not available for mobile satellite service operations in the United States, LQP IS AUTHORIZED to operate in the 1612-1622.60/2483.5-2500 MHz bands.

27. IT IS FURTHER ORDERED that Loral/Qualcomm Partnership, L.P., IS AUTHORIZED to construct, at its own risk, a mobile satellite system capable of operating with feeder links in the 5025-5225 MHz (Earth-to-space) and 6875-7075 MHz (space-to-Earth) frequency bands in accordance with technical specifications set forth in its applications and consistent with our rules unless specifically waived herein.

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[27] RR 2566 specifies the PFD limits at the earth's surface produced by space station emissions at -152 dB(W/m^2) from 0 to 5 degrees above the horizontal plane; -152 + 0.5(, - 5)dB(W/m^2) for angles of arrival , (in degrees) between 5 and 25 degrees; and -142 dB(W/m^2) for angles between 25 and 90 degrees. Task Group 2-2's proposal would permit a higher PFD with figures of -150, -150 + 0.65(, - 5), and -137, respectively, for these angles. *See* Document 2-2/TEMPT/47 (Rev.3)-E.

[28] See WAIT Radio v. FCC, 418 F.2d 1153 (D.C. Cir. 1969).

[29] 47 U.S.C. § 332(c)(5).

[30] Big LEO Order at ¶ 174.

[31] *Id.* at ¶ 175.

[32] *Id.* at ¶ 179.

[33] LQP Amendment (Nov. 15, 1994), at 9.

[34] *Id.* at n.2.

28. IT IS FURTHER ORDERED that application file No. 21-SAT-MISC-95, a request for a waiver of Section 319(d) of the Communications Act to begin construction of feeder links, IS DISMISSED as moot.

29. IT IS FURTHER ORDERED that Loral/ Qualcomm Partnership, L.P. IS AUTHORIZED to offer space segment capacity on its satellite system on a private carriage basis.

30. IT IS FURTHER ORDERED that the license term for the space station constellation is ten years and will commence on the date the licensee certifies to the Commission that the first satellite in the system has been successfully placed into orbit and that the first transmission to or from that satellite in the authorized frequency bands has occurred.

31. IT IS FURTHER ORDERED that this authorization is subject to the completion of consultations under Article XIV of the INTELSAT Agreement and Article 8 of the INMARSAT Convention. Upon completion of these consultations, and notification by the Department of State that the United States has fulfilled its international obligations with respect to INTELSAT and INMARSAT, no further action by this Commission will be required.

32. IT IS FURTHER ORDERED that LQP will prepare any necessary submissions to the International Telecommunication Union (ITU) and will participate in any necessary decisions with other administrations as appropriate in order to coordinate these space stations in accordance with the ITU Radio Regulations.

33. IT IS FURTHER ORDERED that the temporary assignment of any orbital planes, or of any particular frequencies, to Loral/Qualcomm Partnership, L.P. is subject to change by summary order of the Commission on 30 days' notice and does not confer any permanent right to use the orbit and spectrum. Neither this authorization nor any right granted by this authorization, shall be transferred, assigned or disposed of in any manner, voluntarily or involuntarily, or by transfer of control of any corporation holding this authorization, to any person except upon application to the Commission and upon a finding by the Commission that the public interest, convenience and necessity will be served thereby.

FEDERAL COMMUNICATIONS COMMISSION

Scott B. Harris
Chief, International Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Prime Cable of Fort Bend, L.P. Pasadena, Texas — CUID No. TX0252

Order Denying Jurisdiction

MEMORANDUM OPINION AND ORDER

Adopted: February 3, 1995; Released: February 6, 1995

By the Chief, Cable Services Bureau:

1. In this Order we dismiss a complaint against the price Prime Cable of Fort Bend, L.P. ("Prime Cable") was charging for its cable programming service ("CPS") tier in Pasadena, Texas, CUID No. TX0252, on the ground that the complaint concerns rates that are outside the jurisdiction and authority of this Commission. As explained below, the Commission regulates rates for CPS only, and then only upon filing of a valid complaint. Our review reveals that the complaint filed against Prime Cable, while asserting that it challenges CPS rates, challenges only rates for basic service, not for CPS. The complaint therefore does not trigger the Commission's jurisdiction, and it is accordingly dismissed.

2. The Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act of 1992")[1] distinguishes among basic cable service, premium cable service, and cable programming service.[2] The basic service tier is the minimum package of cable service that a consumer can buy. Except in limited circumstances, the Commission does not have jurisdiction over rates for the basic service tier, and cannot act upon complaints concerning rates for that tier. Premium cable service consists of channels that are paid for individually (per-channel) or per-program. By statute, these channels are not subject to rate regulation. CPS includes all video programming that is not on the basic service tier which the operator offers as a package of channels. Rates for CPS tiers are subject to regulation by the Commission in response to a valid complaint.

3. In this case, Prime Cable filed a response to the complaint stating that its "Pasadena system does not offer a cable programming service tier."[3] The channel line-ups and rate cards that Prime Cable submitted support this assertion.

4. The complaint under consideration here was filed with the Commission on FCC Form 329. FCC Form 329 is used by subscribers or local franchising authorities wishing to lodge with the Commission a complaint about an operator's CPS rates. The form is entitled "Cable Programming Service Rate Complaint." While the form is designed for use in challenging CPS tier rates, the definition of CPS tier rates is not made clear on the face of the form and it is possible that someone might complete the form without understanding the difference between basic tier rates, premium service rates, and CPS tier rates.[4]

5. We have examined the complaint and Prime Cable's response, and we conclude that the complaint challenges only basic rates, not CPS rates. Although the complainant indicates that the rates challenged violate the Commission's rules, the specific information provided by the complainant indicates that only basic rates are at issue. When only basic rates are being challenged, the complaint should properly be brought to the attention of the local franchising authority in the first instance, and not filed with this Commission. If the complaint does in fact challenge CPS rates, the complainant may file a petition for reconsideration providing information adequate to support his challenge.

6. Accordingly, IT IS ORDERED, pursuant to Section 623(a)(2)(A) and (B) of the Communications Act of 1934, as amended, 47 U.S.C. §543(a)(2)(A) and (B), that the complaint filed prior to May 14, 1994, against the cable programming service price charged by Prime Cable of Fort Bend, L.P., CUID No. TX0252, IS DISMISSED.

7. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[1] Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (Cable Act of 1992).

[2] Cable Act of 1992, Section 602, 47 U.S.C. § 522.

[3] Letter from Paul Glist, Cole, Raywid & Braverman, to Federal Communications Commission at 1 (May 24, 1994).

[4] We note that operators have great latitude in determining what channels will be included in the basic tier; once the statutory minimum (broadcast and public educational and governmental access channels) is met, the operator may include as many additional channels in the basic tier as it wants, or it may move additional channels to a higher tier. Thus it is possible that a complainant might not clearly understand which channels are part of which tier.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TCI Cablevision of Texas, Inc.
Eagle Pass, Texas — CUID No. TX0114

Order Denying Jurisdiction

MEMORANDUM OPINION AND ORDER

Adopted: February 3, 1995; Released: February 6, 1995

By the Chief, Cable Services Bureau:

1. In this Order we dismiss complaints against the price TCI Cablevision of Texas, Inc. ("TCI") was charging for its cable programming service ("CPS") tier in Eagle Pass, Texas, CUID No. TX0114, on the ground that the complaints concern rates that are outside the jurisdiction and authority of this Commission. As explained below, the Commission regulates rates for CPS only, and then only upon filing of a valid complaint. Our review reveals that the complaints filed against TCI, while asserting that they challenge CPS rates, challenge only rates for basic service, not for CPS. The complaints therefore do not trigger the Commission's jurisdiction, and they are accordingly dismissed.

2. The Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act of 1992")[1] distinguishes among basic cable service, premium cable service, and cable programming service.[2] The basic service tier is the minimum package of cable service that a consumer can buy. Except in limited circumstances, the Commission does not have jurisdiction over rates for the basic service tier, and cannot act upon complaints concerning rates for that tier. Premium cable service consists of channels that are paid for individually (per-channel) or per-program. By statute, these channels are not subject to rate regulation. CPS includes all video programming that is not on the basic service tier which the operator offers as a package of channels. Rates for CPS tiers are subject to regulation by the Commission in response to a valid complaint.

3. In this case, TCI states that in the community of Eagle Pass, Texas, CUID No. TX0114, it only offers one tier of service.[3] The channel line-ups and rate cards that TCI submitted support this assertion.

4. The complaints under consideration here were filed with the Commission on FCC Form 329. FCC Form 329 is used by subscribers or local franchising authorities wishing to lodge with the Commission a complaint about an operator's CPS rates. The form is entitled "Cable Programming Service Rate Complaint." While the form is designed for use in challenging CPS tier rates, the definition of CPS tier rates is not made clear on the face of the form and it is possible that someone might complete the form without understanding the difference between basic tier rates, premium service rates, and CPS tier rates.[4]

5. We have examined the complaints and TCI's response, and we conclude that the complaints challenge only basic rates, not CPS rates. Although the complainants indicate that the rates challenged violate the Commission's rules, the specific information provided by the complainants indicates that only basic rates are at issue. When only basic rates are being challenged, the complaint should properly be brought to the attention of the local franchising authority in the first instance, and not filed with this Commission. If the complaints do in fact challenge CPS rates, the complainants may file a petition for reconsideration providing information adequate to support their challenge.

6. Accordingly, IT IS ORDERED, pursuant to Section 623(a)(2)(A) and (B) of the Communications Act of 1934, as amended, 47 U.S.C. §543(a)(2)(A) and (B), that the complaints filed prior to May 14, 1994, against the cable programming service price charged by TCI Cablevision of Texas, Inc, CUID No. TX0114, ARE DISMISSED.

7. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[1] Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (Cable Act of 1992).

[2] Cable Act of 1992, Section 602, 47 U.S.C. § 522.

[3] Letter from Andrew C. Elson, Corporate Regulatory Specialist, TCI, to Julia C. Buchanan, Attorney-Advisor, FCC (Dec. 14, 1994).

[4] We note that operators have great latitude in determining what channels will be included in the basic tier; once the statutory minimum (broadcast and public educational and governmental access channels) is met, the operator may include as many additional channels in the basic tier as it wants, or it may move additional channels to a higher tier. Thus it is possible that a complainant might not clearly understand which channels are part of which tier.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TIMES MIRROR CABLE TELEVISION
OF SPRINGFIELD, INC.

Appeal of Local
Rate Order of City of
Springfield, Illinois

ORDER

Adopted: February 6, 1995; Released: February 7, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On August 18, 1994, Times Mirror Cable Television of Springfield, Inc. ("Times Mirror") filed with the Commission a Petition for Review of Rate Order ("Petition") of the local rate order ("local order") adopted by the City of Springfield, Illinois ("the City").[1] In its local order, the City established Times Mirror's rates for basic cable service, equipment, installations and hourly service charges.[2] As part of this decision setting the basic tier rates, the City found Times Mirror's collective or package offering of certain individually offered ("a la carte") channels to be a regulated tier of service, and, therefore, included those channels as regulated channels for purposes of the local order. The City ordered Times Mirror to make refunds or to credit subscribers for all payments made in excess of the rates set forth in the local order for the period September 1, 1993 through July 13, 1994.[3]

2. In its appeal, Times Mirror challenges the local order on two grounds. First, Times Mirror argues that the City's decision to treat the a la carte package as a regulated tier of service is contrary to the objectives of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") and the Commission's a la carte rules. Second, Times Mirror alleges that the City established a refund schedule that violates the Commission's procedural rules.[4] The City responds that it properly applied the Commission's guidelines on a la carte packages and concluded that Times Mirror's package should be treated as a regulated tier, and that the procedural rules cited by Times Mirror do not pertain to rate orders issued by a franchising authority.

3. Under our rules, rate orders made by local franchising authorities may be appealed to the Commission.[5] In ruling on appeals of local rate orders, the Commission will not conduct a *de novo* review, but instead will sustain the franchising authority's decision as long as there is a reasonable basis for that decision.[6] Therefore, the Commission will reverse a franchising authority's decision only if it determines that the franchising authority acted unreasonably in applying the Commission's rules in rendering its local rate order.[7] If the Commission reverses a franchising authority's decision, it will not substitute its own decision but instead will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission's decision on appeal.[8] With respect to a determination made by a franchising authority on the regulatory status of an a la carte package as part of its final decision setting rates for the basic service tier, the Commission has stated that "the Commission will defer to the local authority's findings of fact if there is a reasonable basis for the local findings," and the Commission "will then apply FCC rules and precedent to those facts to determine the appropriate regulatory status of the [a la carte package] in question."[9]

II. DISCUSSION

A. A LA CARTE

4. Times Mirror objects to Section 2(C) of the local order, where the City finds that Times Mirror's a la carte services (American Movie Classics, Turner Network Television, The Nashville Network and the Discovery Channel) "are in fact a regulated tier."[10] Times Mirror argues that its a la carte package complies with the provisions of the 1992

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[1] Times Mirror also filed a Petition for Stay Pending Review on August 19, 1994. The City has not filed an opposition to the stay petition and, because we are resolving this dispute on the merits presented in this appeal, the petition for stay has been rendered moot. Other filings in this proceeding include a Response in Opposition to Petition for Review of Rate Order filed by the City on September 2, 1994 and a Reply to Response to Petition for Review of Rate Order filed by Times Mirror on September 14, 1994.

[2] *See* Petition, Exhibit 1, Ordinance Regulating Basic Tier Cable Television Rates and Associated Equipment and Installation Costs and Ordering a Refund to Subscribers, Ordinance No. 597-7-94, City of Springfield, Illinois, dated July 19, 1994.

[3] Under the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992), Communications Act of 1934, § 623(b), 47 U.S.C. § 543(b), and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment.

[4] In its argument, Times Mirror cites to the Commission's Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Report, MM Docket 92-266, 8 FCC Rcd 5631, 5836-5838 (1993) (*"Rate Order"*).

[5] 47 C.F.R. § 76.944.

[6] *Rate Order*, 8 FCC Rcd at 5731; *See* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Buy-Through Prohibition, Third Order on Reconsideration, MM Docket 92-266, 9 FCC Rcd 4316, 4346 (1994) (*"Third Reconsideration Order"*).

[7] *Id.*

[8] *Rate Order*, 8 FCC Rcd at 5732; *Third Reconsideration Order*, 9 FCC Rcd at 4346.

[9] Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Second Order on Reconsideration and Fourth Report and Order, MM Docket No. 92-266, 9 FCC Rcd 4119, 4217 (1994) (*"Second Reconsideration Order"*).

[10] Petition, Exhibit 1 at 2.

Cable Act, which it contends encourage cable operators to unbundle programming services from regulated tiers and offer them on a per-channel basis.[11] Times Mirror further argues that its a la carte package fully complies with Commission rules for unregulated treatment existing at the time the package was created.[12]

5. The Times Mirror a la carte services at issue were first offered to subscribers on August 31, 1993, when Times Mirror restructured the service offerings on its Springfield system. Times Mirror states that its August 31, 1993 restructuring involved consolidating its two cable programming service tiers into one cable programming service tier and offering the four channels from one of the two former cable programming service tiers on an individual basis and also as a package that Times Mirror alleges is not subject to rate regulation.

6. The facts presented in this appeal closely resemble the facts presented in one of our letter of inquiry orders, *Dimension Cable Services*, Rancho Palos Verdes, California, LOI-93-37, DA 94-1309 (Cab. Serv. Bur. released Nov. 25, 1994), in which we resolved the regulatory status of an la carte package offered by Times Warner on its Rancho Palos Verdes system that is essentially the same as the a la carte package at issue in this appeal. Specifically, the Time Warner a la carte package at issue in the *Dimension Cable Services* order was a four channel package that was offered as part of a restructuring that also involved the consolidation of two cable programming services tiers into one. In the *Dimension Cable Services* case, we found we could not say that it was clear that the a la carte package at issue was not a permissible non-rate regulated offering under our rules. We further concluded that in light of the prior confusion over what constituted a permissible non-rate regulated a la carte offering, it would be inequitable to subject the operator to refund liability or to require the operator to restructure its tiers so as to return the channels offered in the a la carte package to regulated tiers. Instead, we found that, on a prospective basis, the a la carte package at issue may be treated as a new product tier under the Commission's *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Sixth Order on Reconsideration and Fifth Report and Order*, MM Docket Nos. 92-266 and 93-215, FCC 94-286 (released November 18, 1994) (*"Going Forward Order"*).[13]

7. We find that the City's determination that Times Mirror's a la carte package is a regulated tier is inconsistent with the action taken in the letter of inquiry orders, and in particular, in *Dimension Cable Services*. We further find that, in accordance with *Dimension Cable Services*, Times Mirror's a la carte package should not be treated as a rate regulated tier of service. Accordingly, we are remanding this issue to the City so that it can enter an order consistent with our findings in *Dimension Cable Services*.

B. Timing Of Compliance with Local Order

8. Additionally, Times Mirror objects to Section 7 of the local order in which the City orders reductions and subscriber refunds "within forty (40) days of the date of this ordinance."[14] In its appeal, Times Mirror argues that the 40 day timetable mandated for compliance with the local order is insufficient and contrary to Commission rules.[15] Times Mirror cites one of our public notices in arguing that a franchising authority must allow a cable operator at least thirty days' notice to its subscribers of a rate change and must take into consideration the amount of time necessary to prepare and send out notices and bills.[16] Times Mirror states that the implementation schedule ordered by the City failed to take these considerations into account.[17] Times Mirror also cites language from the *Rate Order* in which the Commission stated "cable operator[s] will be required to implement any reduction in rates or refunds within 60 days from the date the Commission releases an order finding the contested rate to be unreasonable and mandating a remedy"[18] and that "[a]s to the mechanics of making refunds, . . . franchising authorities should follow the procedures which we are adopting for cable programming services."[19] In its Opposition, the City responds that the implementation language cited by Times Mirror refers to compliance with rate orders that are issued by the Commission, not franchising authorities.[20]

9. Our rules do not explicitly require franchising authorities to provide cable operators with 60 days to comply with local rate orders. The City correctly notes that the reference in the *Rate Order* to the 60 day timetable for compliance with rate orders is directed to rate orders issued by the Commission. In addition, the *Rate Order* language cited by Times Mirror, which states that franchising authorities should follow the refund procedures we established for cable programming services, does not require franchising authorities to provide cable operators with 60 days to comply with local rate orders. The refund procedures referenced in the *Rate Order* are those having to do with identification of subscribers for refund purposes and how that refund is paid (i.e., actual refund payment or one-time credit).[21] The only Commission regulation relevant to the timing of compliance with local rate orders is Section 76.964(b) of our rules which provides that "cable systems shall give 30 days written notice to both subscribers

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[11] Petition at 4.

[12] *Id.* at 8. *See Rate Order*, 8 FCC Rcd at 5836-5838; *See* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, First Order on Reconsideration, MM Docket 92-266, 9 FCC Rcd 1164, 1184 (1993).

[13] New product tiers are cable programming services that, subject to certain conditions, are not rate regulated. *Going Forward Order* at ¶ ¶ 16-37. In the *Going Forward Order*, the Commission reconsidered its regulatory treatment of collective offerings of a la carte channels. Specifically, the Commission determined that such packages are cable programming service tiers within the meaning of Section 3(1)(2) of the 1992 Cable Act and therefore will be subject to our general rate regulation rules. *Id.* at ¶ 51. However, the Commission also stated that with respect to packages created between April 1, 1993 and September 30, 1994, where it is not clear that a particular package was not a permissible offering under the a la carte rules in effect at the time it was created, the package may be treated as a new product tier. *Id.*

[14] Petition at 3.

[15] *Id.* at 20-21.

[16] Petition at 21.

[17] *Id.*

[18] Petition at 20, n.38; *Rate Order*, 8 FCC Rcd at 5867.

[19] *Id.; Rate Order*, 8 FCC Rcd at 5726-5727.

[20] *Rate Order*, 8 FCC Rcd at 5867.

[21] *Rate Order*, 8 FCC Rcd at 5727, footnote 378.

and local franchising authorities before implementing any rate or service change."[22] However, we also have stated in a *Public Notice* previously, and reiterate here that,

> in specifying an effective date [for its local order], a franchising authority should take into consideration the amount of time necessary to prepare and send out notices and bills reflecting a rate change, giving due regard to the impact of cycle billing, if applicable.[23]

The instruction to franchising authorities in the *Public Notice* is based on the same rationale we used in concluding that cable operators should have 60 days to implement a Commission order requiring refunds of cable programming service tier rates. In the *Rate Order*, we said

> a 60-day time period to implement remedial measures will better accommodate standard billing cycles than the 30-day period we proposed in the *Notice*, thus preventing undue burdens on operators — without adversely affecting subscribers.[24]

Thus we find that, while a franchising authority may, in its discretion, specify a reasonable time period for compliance with its rate order, the time specified must be sufficient to allow preparation and distribution of notices and bills, and must accomodate the time demands of cycle billing. We found in the *Rate Order* that such a time period was at least 60 days. We have no reason to believe that implementation of a local order should be any less time-consuming than the implementation of our orders.

10. The City required Times Mirror to comply with the terms of the local order within 40 days of its effective date. Such a requirement, on its face, is not inconsistent with our requirement that cable systems give subscribers 30 days' notice of rate changes. However, it is inconsistent with the rationale we have used to support a 60-day period for implementation of our rate orders. The City does not provide us with any specifics in support of its decision to impose a different time period than the time period we have adopted to implement our rate decisions. We have no indication that the City gave the consideration necessary to ensure that the business demands of Times Mirror were accommodated. Accordingly, we remand this issue to the City to ensure that the implementation period of the local order does not unduly burden Times Mirror and is consistent with our findings herein.

III. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED that the appeal of the local order, with respect to the issue of the regulatory status of Times Mirror's a la carte package and the issue of a reasonable time period for compliance with City's local order, is REMANDED to the City for resolution in accordance with the terms of this Order.

12. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[22] *See* 47 C.F.R. 76.964 (b).
[23] *See Public Notice*, Questions and Answers on Cable Television Rate Regulation, Question 3 (May 18, 1994).
[24] *Rate Order*, 8 FCC Rcd at 5867.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TIMES MIRROR CABLE TELEVISION, INC.
OF SAN DIEGO COUNTY,
d/b/a DIMENSION CABLE SERVICES

Interlocutory Appeal of
Local Rate Order of City
of Oceanside, California

ORDER

Adopted: February 6, 1995; Released: February 7, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On August 31, 1994, Times Mirror Cable Television of San Diego County, California Inc., d/b/a Dimension Cable Services ("Dimension") filed with the Commission a Petition for Interlocutory Review of Initial Decision ("Petition") of the initial decision adopted by the City of Oceanside, California (the "City").[1] In Resolution No. R94-168, adopted August 17, 1994, the City made an initial determination that the channels contained in Dimension's "Preferred Dimension" package are subject to rate regulation.[2]

2. In the *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Second Order on Reconsideration, Fourth Report and Order,* MM Docket No. 92-266, 9 FCC Rcd 4119 (released March 30, 1994) (*"Second Reconsideration Order"),* the Commission provided that as part of their review of basic service tier rates, local authorities may make an initial decision addressing only the regulatory status of any a la carte package at issue.[3] The Commission further provided that the local authority's initial decision may be appealed to the Commission within 14 days and that the issuance of an initial decision on a la carte issues will toll the time period within which local authorities must decide local rate cases.[4]

II. DISCUSSION

3. Dimension objects to the City's finding that the channels comprising its Preferred Dimension a la carte package must be included as regulated channels. Dimension argues that its a la carte package complies with the provisions of the 1992 Cable Act, which it contends encourage cable operators to unbundle programming services from regulated tiers and offer them on a per-channel basis, and that the package complies with the Commission's a la carte rules in effect at the time the package was created.[5] Dimension further argues that the City's reliance upon the 15 interpretive guidelines announced by the Commission in March, 1994 to determine the regulatory status of Multivision's a la carte channels constituted "retroactive rulemaking."[6] The City responds that it properly applied the Commission's guidelines on a la carte packages and concluded that the channels in Dimension's package should be treated as regulated channels.

4. The Dimension a la carte package at issue was first offered to subscribers on September 1, 1993, when Dimension restructured the service offerings on its Oceanside system. Dimension states that its September 1, 1993 restructuring involved offering four channels that previous-

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[1] Other filings in this proceeding include Respondent's Answer to Petition for Interlocutory Review of Initial Decision ("Answer") filed by the City on November 9, 1994, and a Reply to Answer to Petition for Interlocutory Review filed by Dimension on November 22, 1994. In its Reply, Dimension correctly notes that the City's Answer was filed late. Our rules require that oppositions be filed within 15 days after the appeal is filed, which was September 15, 1994 in the instant case. *See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Report and Order,* MM Docket 92-266, 8 FCC Rcd 5631, 5730-31 (*"Rate Order").* We need not strike the City's Answer from the record, however, because the result we reach herein is based on grounds other than those set forth in the City's Answer. In particular, our decision herein is based on our previous order in *Dimension Cable Services,* Oceanside, California, LOI-93-36, DA 94-1310 (Cab. Serv. Bur., released Nov. 25, 1994). *See* para. 5, *infra.*

[2] The Preferred Dimension channels are offered in a package or on an individual ("a la carte") basis.

[3] *Second Reconsideration Order,* 9 FCC Rcd at 4217.

[4] *Id.* In its Petition, Dimension questions the City's authority to issue an initial decision on the a la carte issue on the ground that the City allegedly did not comply with the Commission's procedural deadlines for issuing such a decision. Dimension correctly notes that under the procedures outlined by the Commission in the *Second Reconsideration Order,* a local franchising authority choosing to make an initial decision on the a la carte issue is required to do so within the 30-day period for reviewing basic cable service rates, or within the first 60 days of an extended 120-day period (if the franchising authority has requested an additional 90 days). *See Second Reconsideration Order,* 9 FCC Rcd at 4217. Dimension argues that the City's initial decision was adopted beyond the 60 day deadline provided for in the *Second Reconsideration Order* because Dimension's Form 393 was filed on November 10, 1993, and the City adopted its initial decision on the a la carte issue on August 17, 1994. Under Dimension's argument, the City would have been required to issue its initial decision on the a la carte issue by January 9, 1994. We note, however, that the procedural deadline cited by Dimension was not adopted by the Commission until March 30, 1994, and did not become effective until May 15, 1994. We further note that the Commission previously has issued an order resolving the regulatory status of Dimension's a la carte package in *Dimension Cable Services,* in which we found that Dimension's a la carte package could be treated as a new product tier. *See* para. 5, *infra.* Under the circumstances, we will proceed to rule on the regulatory status of the a la carte package.

[5] *See Rate Order,* 8 FCC Rcd at 5836-5838.

[6] Petition at 21. In the *Second Reconsideration Order,* the Commission set out 15 guidelines "that local authorities and the Commission should consider in assessing in an individual case whether an 'a la carte' package enhances consumer choice and does not constitute an evasion of rate regulation." *Second Reconsideration Order* at 4214.

ly had been offered on its former cable programming service tier on an individual basis and also as a package that Dimension alleges is not subject to rate regulation.

5. The issue raised by Dimension's appeal already has been resolved in one of our letter of inquiry orders, *Dimension Cable Services, Oceanside, California*, LOI-93-36, DA 94-1310 (Cab. Serv. Bur., released Nov. 25, 1994). In *Dimension Cable Services*, we found we could not say that it was clear that the Preferred Dimension package offered by Dimension on its Oceanside, California system was not a permissible non-rate regulated offering under our rules. We further concluded that in light of the prior confusion over what constituted a permissible non-rate regulated a la carte offering, it would be inequitable to subject Dimension to refund liability or to require Dimension to restructure its tiers so as to return the channels offered in the a la carte package to regulated tiers. Instead, we found that, on a prospective basis, the Preferred Dimension package may be treated as a new product tier under the Commission's *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Sixth Order on Reconsideration, Fifth Report and Order*, MM Docket Nos. 92-266 and 93-215, FCC 94-286 (released November 18, 1994) (*"Going Forward Order"*).[7]

6. We find that the City's determination in its initial decision that the channels comprising Dimension's a la carte package must be included as regulated channels is inconsistent with the action taken in *Dimension Cable Services*. We further find that, in accordance with *Dimension Cable Services*, Dimension's a la carte package should not be treated as a rate-regulated tier of service. Accordingly, Dimension's Petition is granted and we remand the initial decision to the City for further proceedings consistent with this ruling.[8]

III. ORDERING CLAUSES

7. Accordingly, IT IS ORDERED that the appeal of the initial decision, with respect to the issue of the regulatory status of Dimension's a la carte package, is REMANDED to the City for resolution in accordance with the terms of this Order.

8. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[7] New product tiers are cable programming services that, subject to certain conditions, are not rate regulated. *Going Forward Order* at ¶ ¶ 16-37. In the *Going Forward Order*, the Commission reconsidered its regulatory treatment of collective offerings of a la carte channels. Specifically, the Commission determined that such packages are cable programming service tiers within the meaning of Section 3(1)(2) of the 1992 Cable Act and therefore will be subject to our general rate regulation rules. *Id.* at ¶ 51. However, the Commission also stated that with respect to packages created between April 1, 1993 and September 30, 1994, where it is not clear that a particular package was not a permissible offering under the a la carte rules in effect at the time it was created, the package may be treated as a new product tier. *Id.*

[8] We need not address Dimension's argument with respect to the "retroactive" application by the City of the 15 guidelines set forth in the *Second Reconsideration Order*, in light of the fact that we grant Dimension's Petition and reverse the City's initial decision.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MULTI-CHANNEL T.V.
CABLE COMPANY
d/b/a ADELPHIA
CABLE COMMUNICATIONS

Interlocutory Appeal of
Local Rate Order of City
of Charlottesville, Virginia

ORDER

Adopted: February 6, 1995; Released: February 7, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On November 3, 1994, Multi-Channel T.V. Cable Company, d/b/a Adelphia Cable Communications ("Adelphia"), filed with the Commission a Petition for Interlocutory Review of Initial Decision ("Petition") of the preliminary rate order adopted by the City of Charlottesville, Virginia (the "City").[1] In a Resolution, adopted October 19, 1994 (the "local order"), the City made an initial determination that Adelphia's collective offerings of certain a la carte channels be treated as a regulated tier of service.[2]

2. In the *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Second Order on Reconsideration, Fourth Report and Order*, MM Docket No. 92-266, 9 FCC Rcd 4119 (1994) (*"Second Reconsideration Order"*), the Commission provided that as part of their review of basic service tier rates, local authorities may make an initial decision addressing only the regulatory status of any a la carte package at issue.[3] The Commission further provided that the local authority's initial decision may be appealed to the Commission within 14 days and that the issuance of an initial decision on a la carte issues will toll the time period within which local authorities must decide local rate cases.[4]

II. DISCUSSION

3. Adelphia objects to the City's finding in the local order that the CableSelect channels must be included as regulated channels for purposes of the local order. Adelphia argues that the City exceeded its authority in determining that its a la carte services should be treated as regulated channels. Adelphia argues that the City applied the wrong legal standard when it relied on the 15 interpretive guidelines announced by the Commission in March 1994 to determine the regulatory status of Adelphia's a la carte channels and unfairly gave "retroactive effect" to these guidelines.[5] Adelphia further argues that its a la carte packages comply with the provisions of the 1992 Cable Act, which it contends encourages cable operators to unbundle programming services from regulated tiers and offer them on a per-channel basis and that the packages comply with the Commission's a la carte rules in effect at the time the packages were created.[6] The City responds that it properly exercised its authority and correctly applied the Commission's guidelines on a la carte packages in concluding that the channels in Adelphia's package should be treated as regulated channels.

4. The Adelphia a la carte services at issue were first offered to subscribers on August 30, 1993, when Adelphia restructured the service offerings on its Charlottesville system. Adelphia states that beginning August 30, 1993 it began offering all "non-basic" services on an a la carte basis. Adelphia states that its August 30, 1993 restructuring involved eliminating its 17 channel "satellite service" cable programming service tier and its 14 channel "expanded satellite" cable programming service tier and offering all 31 channels both on an individual basis and as a package of 17 channels called CableValue or as a package of 31 channels called CableSelect that Adelphia alleges are not subject to rate regulation.

5. The regulatory status of such an offering has previously been addressed by the Commission. In *Adelphia Cable Partners, L.P. South Dade County, Florida*, LOI-93-42, DA 94-1277 (Cab. Serv. Bur., released Nov. 18, 1994), we resolved the regulatory status of a similar a la carte offering by Adelphia on its South Dade County, Florida system.[7] In *Adelphia Cable Partners* we found that Adelphia's retiering on its South Dade County system constituted an evasion of rate regulation. We therefore found that Adelphia's South Dade a la carte package must be treated as a rate-regulated cable programming service tier and that the channels composing it must be counted as rate-regulated channels for purposes of rate justification as of September 1, 1993.

6. Adelphia's Charlottesville a la carte package closely resembles its South Dade a la carte package which was the subject of our order in *Adelphia Cable Partners*. Accordingly, the regulatory status of Adelphia's Charlottesville

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[1] Other filings in this proceeding include Respondent's Response to Petition for Interlocutory Review of Initial Decision filed by the City on November 15, 1994, and a Reply to Response to Petition for Interlocutory Review filed by Adelphia on November 31, 1994.

[2] *See* Petition Exhibit 1. Adelphia offered 31 channels on an individual or a la carte basis which it referred to as "CableSelect" channels. It offered all of the CableSelect channels collectively in a 31 channel package called "CablePlus" or in a 17 channel package called "CableValue."

[3] *Second Reconsideration Order*, 9 FCC Rcd at 4217.

[4] *Id.*

[5] Petition at 9. In the *Second Reconsideration Order*, the Commission set out 15 guidelines "that local authorities and the Commission should consider in assessing in an individual case whether an 'a la carte' package enhances consumer choice and does not constitute an evasion of rate regulation." *Second Reconsideration Order*, 9 FCC Rcd at 4214.

[6] *See Rate Order*, 8 FCC Rcd at 5836-5838.

[7] Adelphia's South Dade system restructured its offering to create 32 channels offered on an individual or package basis.

package at issue in this petition should be the same. We find that the City's conclusion that the channels in Adelphia's a la carte package must be included as regulated channels is consistent with letter of inquiry orders issued by the Bureau, and in particular in *Adelphia Cable Partners*. Therefore, we hereby deny Adelphia's Petition.[8]

III. ORDERING CLAUSES

7. Accordingly, IT IS ORDERED that the petition for review of the local order, with respect to the issue of the regulatory status of Adelphia's a la carte package, is DENIED.

8. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[8] Adelphia's argument that the City has no authority to determine the regulatory status of a la carte service offerings is without merit. The City's rate order was adopted on October 19, 1994. In the *Second Reconsideration Order*, effective May 15, 1994, the Commission provided that local authorities may make any necessary 'a la carte' determination as part of their final decision setting rates for the basic tier. *Second Reconsideration Order*, 9 FCC Rcd at 4217. Contrary to Adelphia's contention, this provision does not delegate the Commission's jurisdiction over cable programming service tier rates to local authorities. Rather, it allows local authorities to make a determination concerning the number of regulated channels that is necessary to accomplish their review of basic service tier rates.

We note that we need not address Adelphia's argument with respect to the "retroactive" application by the City of the 15 guidelines set forth in the *Second Reconsideration Order* in light of the fact that we deny Adelphia's petition based on the precedent established in our letter of inquiry orders on the a la carte issue.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMCAST CABLEVISION OF
LOWER MERION, INC.

Appeal of Local
Rate Order of the Township
of Lower Merion, PA

ORDER

Adopted: February 6, 1995; Released: February 7, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On September 2, 1994, Comcast Cablevision of Lower Merion, Inc. ("Comcast"), filed with the Commission a Petition for Review of Rate Order of the supplemental local rate order adopted by the Township of Lower Merion, Pennsylvania (the "Township").[1] In its supplemental local order, the Township established Comcast's rates for basic cable service, equipment, installations and hourly service charges.[2] As part of this decision setting the basic tier rates, the Township found Comcast's collective or package offering of certain individually offered ("a la carte") channels to be a regulated tier of service, and, therefore, included those channels as regulated channels for purposes of the supplemental local order. The Township ordered Comcast to make refunds to subscribers for all payments made in excess of the rates set forth in the supplemental local order for the period September 1, 1993 through July 14, 1994.[3]

2. In its Petition, Comcast challenges the Township's characterization in the supplemental local order of Comcast's a la carte package as a regulated tier. Comcast argues that the package complies with the Commission's rules and interpretative guidelines regarding a la carte channels. Specifically, Comcast asserts that (1) the package price is less than the sum of its individual components; (2) the individual a la carte channels are offered to subscribers at a rate lower than the package rate; and (3) the package offers subscribers a meaningful choice. Comcast further argues that, contrary to the Township's findings, the package conforms to a majority of the interpretative guidelines adopted in the *Second Reconsideration Order*.[4] The Township responds that it properly applied the Commission's guidelines on a la carte packages and concluded that the four Value Pak channels should be treated as rate regulated.

3. Under our rules, rate orders made by local franchising authorities may be appealed to the Commission.[5] In ruling on appeals of local rate orders, the Commission will not conduct a *de novo* review, but instead will sustain the franchising authority's decision as long as there is a reasonable basis for that decision.[6] Therefore, the Commission will reverse a franchising authority's decision only if the Commission determines that the franchising authority acted unreasonably in applying the Commission's rules in rendering its local rate order.[7] If the Commission reverses a franchising authority's decision, it will not substitute its own decision but instead will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission's decision on appeal.[8] With respect to a determination made by a franchising authority on the regulatory status of an a la carte package as part of its final decision setting rates for the basic service tier, the Commission has stated that "the Commission will defer to the local authority's findings of fact if there is a reasonable basis for the local findings," and the Commission "will then apply FCC rules and precedent to those facts to determine the appropriate regulatory status of the [a la carte package] in question."[9]

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[1] On April 20, 1994, the Township adopted a rate order establishing Comcast's equipment and installation rates and ordered Comcast, *inter alia*, to provide information regarding Comcast's a la carte package. On August 3, 1994, the Township adopted the supplemental rate order at issue here which addressed the a la carte package. Other filings in this proceeding include an Erratum filed by Comcast on September 7, 1994; an Opposition of Township of Lower Merion to Petition filed by the Township on September 19, 1994; and a Reply of Comcast of Lower Merion Inc. to the Opposition of the Township of Lower Merion, filed by Comcast on September 26, 1994.

[2] *See* Petition, Exhibit A, Resolution Adopting a Rate Order Regarding Basic Service Rates and Associated Charges of Comcast Cablevision of Montgomery County, Pennsylvania, dated August 3, 1994 ("supplemental local order").

[3] Under the Cable Television Consumer Protection and Competition Act of 1992 (*"1992 Cable Act"*) Pub. L. No. 102-385, 106 Stat. 1460 (1992), Communications Act of 1934, § 623(b), 47 U.S.C. § 543(b) and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment.

[4] Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Second Order on Reconsideration and Fourth Report and Order, MM Docket No. 92-266, 9 FCC Rcd 4119, 4214-4216 (1994) (*"Second Reconsideration Order"*).

[5] 47 C.F.R. § 76.944.

[6] *See* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Report and Order, MM Docket 92-266, 8 FCC Rcd 5631, 5837 (1993) (*"Rate Order"*); and Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Buy-Through Prohibition, Third Order on Reconsideration, MM Docket No. 92-266 and 92-262, 9 FCC Rcd 4316, 4346 (1994) (*"Third Reconsideration Order"*).

[7] *Id.*

[8] *Rate Order*, 8 FCC Rcd at 5732; *Third Reconsideration Order*, 9 FCC Rcd at 4346.

[9] *Second Reconsideration Order*, 9 FCC Rcd at 4217.

II. DISCUSSION

4. Comcast objects to Ordering Clause No. 1 of the supplemental local order, where the Township finds that maximum initial permitted rates for basic services shall be calculated by treating Comcast's a la carte package, consisting of American Movie Classics, Turner Network Television, WTBS and WWOR, as a rate regulated offering.[10] Comcast argues that its a la carte package conforms with Commission rules for unregulated treatment of a la carte packages.[11]

5. The Comcast a la carte services at issue were first offered to subscribers on September 1, 1993, when Comcast restructured the service offerings on its Lower Merion system. Comcast states that its September 1, 1993 restructuring involved moving a total of four channels from regulated tiers (two from its basic tier and two from its cable programming service tier) and offering the four channels both on an individual basis and as a package that Comcast alleges is not subject to rate regulation.

6. The facts presented in this appeal closely resemble the facts presented in two of our recently issued letter of inquiry orders on a la carte packages, *Comcast Cablevision*, City of Tallahassee, Florida, LOI 93-2, DA 94-1275 (Cab. Serv. Bur., released Nov. 18, 1994) and *Comcast Cablevision*, Howard County, Maryland, LOI 93-3, DA 94-1423 (Cab. Serv. Bur., released Dec. 12, 1994), in which we resolved the regulatory status of la carte packages offered by Comcast on its Tallahassee and Howard County systems that are essentially the same as the a la carte package at issue in this appeal. Specifically, the Comcast a la carte packages at issue in the above orders were four channel packages that were offered as part of a restructuring that also involved the consolidation of two cable programming services tiers into one. In the *Comcast Cablevision* cases, we found we could not say that it was clear that the a la carte packages at issue were not permissible non-rate regulated offerings under our rules. We further concluded that in light of the prior confusion over what constituted a permissible non-rate regulated a la carte offering, it would be inequitable to subject the operator to refund liability or to require the operator to restructure its tiers so as to return the channels offered in the a la carte packages to regulated tiers. Instead, we found that the a la carte packages at issue may be treated as new product tiers under the Commission's *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Sixth Order on Reconsideration and Fifth Report and Order*, MM Docket Nos. 92-266 and 93-215, FCC 94-286 (released November 18, 1994) ("*Going Forward Order*").[12]

7. We find that the Township's determination that Comcast's a la carte package on its Lower Merion system is a regulated tier is inconsistent with the action taken in the letter of inquiry orders, and in particular, in the *Comcast Cablevision* cases. We further find that, in accordance with the *Comcast Cablevision* cases, Comcast's a la carte package should not be treated as a rate regulated tier of service. Accordingly, we are remanding this issue to the Township so that it can enter an order consistent with our findings in the *Comcast Cablevision* cases.

III. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED that the Petition of the supplemental local order, with respect to the issue of the regulatory status of Comcast's a la carte package, is REMANDED to the Township for resolution in accordance with the terms of this Order.

9. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[10] Petition at 1-2.

[11] *Id.* at 2 and 5. *See Rate Order*, 8 FCC Rcd at 5836-5838; *Second Reconsideration Order*, 9 FCC Rcd at 4213.

[12] New product tiers are cable programming services that, subject to certain conditions, are not rate-regulated. *Going Forward Order* at ¶ ¶ 16-37. In the *Going Forward Order*, the Commission reconsidered its regulatory treatment of collective offerings of a la carte channels. Specifically, the Commission determined that such packages are cable programming service tiers within the meaning of Section 3(1)(2) of the 1992 Cable Act and therefore will be subject to our general rate regulation rules. *Id.* at ¶ 51. However, the Commission also stated that with respect to packages created between April 1, 1993 and September 30, 1994, where it is not clear that a particular package was not a permissible offering under the a la carte rules in effect at the time it was created, the package may be treated as a new product tier. *Id.*

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

HARRON	Abington, MA 0225
COMMUNICATIONS	Bourne, MA 0247
CORP.,	Halifax, MA 0229
Petitioner,	Pembroke, MA 0228
	Plympton, MA 0245
	Rockland, MA 0224
	Sandwich, MA 0246

v.

COMMONWEALTH
OF MASSACHUSETTS
COMMUNITY
ANTENNA TELEVISION
COMMISSION,
Respondent.

Appeal of Enforcement of
Local Rate Orders

CONSOLIDATED ORDER

Adopted: February 6, 1995; Released: February 7, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Harron Communications Corp. ("Harron"), the franchisee in the above-referenced matter, filed on June 20, 1994 a Consolidated Appeal and Request for Stay of the local rate orders adopted May 20, 1994 by its franchising authority, the Commonwealth of Massachusetts Community Antenna Television Commission ("CATC").[1] In the local rate orders, CATC established regulated rates for basic cable service and associated equipment as required by the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act").[2] Harron seeks a stay of the local rate orders pending Commission resolution of its appeal on the merits. CATC opposes the request for stay as well as the appeal on the merits. In this consolidated order, we decide the merits of the appeals and therefore dismiss the request for stay as moot.

2. Under our rules, rate orders adopted by local franchising authorities ("LFAs") may be appealed to the Commission.[3] In ruling on appeals of local rate orders, the Commission does not conduct a *de novo* review, but instead will sustain the LFA's order as long as there is a reasonable basis for its decision.[4] The Commission will therefore reverse a LFA's decision only if it is determined that the LFA acted unreasonably in applying the commission's rules in rendering its local rate order.[5] If the Commission reverses a LFA's decision, it will not substitute its own decision, but will instead remand the issue to the LFA with instructions for its resolution.[6]

II. DISCUSSION

3. Harron's appeal rests on the treatment of various items in its FCC Form 393 filing by CATC. FCC Form 393 is the official form used by regulators to determine whether an operator's regulated rates for programming, equipment and installations were reasonable during the time period from September 1, 1993 until May 14, 1994.[7] Form 393 is divided into three separate, but interrelated parts. In Part II, the operator calculates its maximum permitted programming rates, while in Part III, the operator calculates its maximum permitted equipment and installation rates. Part I is a cover sheet that lists the various programming, equipment and installation rates that have been calculated in Parts II and III and compares them to the rates the operator has actually charged during the period of review.

4. The operator's maximum permitted rates are derived by completing Parts II and III of the Form 393, pursuant to which the operator calculates the actual aggregate revenues collected by the operator for regulated programming, equipment and installation, as of the initial date of regulation ("current rate") or as of September 30, 1992.[8] After calculating actual aggregate revenues, the operator converts those revenues to a per-channel rate, and then compares the per-channel figures to the applicable benchmark rate. If an operator's current per-channel rate is below the applicable benchmark rate, then the operator's rate is deemed reasonable, but it must remain at its current level. If its current per-channel rate exceeds the benchmark rate, the operator must then compare its September 30, 1992 per-channel rate to the applicable benchmark rate. If its Sep-

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[1] The seven communities covered by Harron's Consolidated Appeal and Request for Stay are: Abington, Bourne, Halifax, Pembroke, Plympton, Rockland and Sandwich.

[2] Under the 1992 Cable Act and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment. Pub. L. No. 1002-385, 106 Stat. 1460 (1992); Communications Act, *as amended*, § 623(b), 47 U.S.C. § 543(b) (1993).

[3] 47 C.F.R. § 76.944 (1993).

[4] *See* Report and Order and Further Notice of Proposed Rulemaking in MM Docket 92-266, 8 FCC Rcd 5631, 5731(1993) (*"Rate Order"*); Third Order on Reconsideration in MM Docket 92-266, 9 FCC Rcd 4316, 4346 (1994) (*"Third Recon. Order"*).

[5] *Id.*

[6] *Id.*

[7] To the extent that an operator has sought to take advantage of the refund deferral period available under the Second Order on Reconsideration, Fourth Report an Order, and Fifth Notice of Proposed Rulemaking in MM Docket 92-266, 9 FCC Rcd 4119, 4183-4185 (1994), the maximum permitted rates determined under Form 393 may also apply from May 15, 1994 until the date that the operator implemented its new rates, as determined under the Form 1200 series.

[8] An operator must calculate its rate in effect on September 30, 1992, only if its current rate is above the benchmark rate. If an operator's current rate is at or below the benchmark rate, it is not required to calculate its September 30, 1992 per-channel rate.

tember 30, 1992 per-channel rate is above the benchmark rate, it must reduce this rate to the benchmark rate or by 10%, whichever reduction is less. The adjusted rate will be its maximum permitted rate for programming. Maximum permitted rates for equipment and installation are based on actual cost and are calculated in Part III of the Form 393. Equipment rates are derived from capital and maintenance costs per unit of equipment. Installation rates are derived from calculation of an hourly service charge and application of that charge to different types of installations. Under our regulations, the maximum permitted rates are deemed to be reasonable, as required by the 1992 Cable Act.[9] Requiring cable operators to set all or some of their rates for programming, equipment or installation below their maximum permitted levels would force them to charge rates at levels below those specifically allowed under our rules.[10]

5. Virtually all of the issues Harron raises on appeal relate to the determination of proper costs and labor hours for completion of FCC Form 393. These include: (1) CATC's calculation of Harron's Hourly Service Charge ("HSC"); (2) CATC's allocation of Harron's customer equipment maintenance and installation costs; (3) the allocation of Harron's supply expense costs; (4) the allocation of its salary and benefit expenses; (5) the allocation of its utility expenses; (6) the allocation of its drop material expenses; (7) CATC's calculation of Harron's converter repair hours; (8) and CATC's calculation of Harron's refund lability. We consider each of these issues in turn. Harron also questions the authority of local franchising authorities ("LFAs") to require refunds. We have responded to that argument previously and have established rules which authorize the local franchising authority to order refunds for unreasonable basic service tier rates.[11] We will not revisit that issue here.

A. Hourly Service Charge

6. Harron first asserts that CATC improperly inflated Harron's HSC, in Part III of its FCC Form 393, by decreasing the total number of labor hours for maintenance and installation of customer equipment. The HSC is designed to recover the costs of service installation and maintenance of customer equipment.[12] In calculating its original HSC, Harron included both direct and indirect costs on Line 3, Step A and also direct and indirect hours related to service of regulated equipment and installation activities on Line 4, Step A. In recalculating Harron's Form 393, CATC entered the applicable direct and indirect costs on Line 3, but only the hours directly associated with service and installation on Line 4 of Step A.[13] This resulted in a higher HSC because the total costs entered on Line 3 were divided by a smaller number of hours. Similarly, CATC excluded indirect hours from the calculation of installation rates on schedule D, and from the calculation charges for remotes and converters in Steps C and D, Lines 9 and 16.

7. Commission rules state that indirect costs must be included, as both CATC and Harron did, in the equipment basket calculation.[14] Harron only disagrees with CATC's exclusion of the associated indirect hours in the calculation on Line 4, Step A, and claims that both direct and indirect hours should have been included for the calculation to be complete. In fact, the inclusion or exclusion of indirect hours, if properly done, should not affect an operator's total recovery, although it may affect the exact prices charged for installations and equipment. Line 3 of Step A reports the total costs, excluding the capital costs for leased customer equipment, that the operator will recover through equipment and installation charges. These costs are allocated among different equipment and installation charges in the remainder of Step A, Schedule D, and Steps B through F. If indirect hours are consistently excluded in these calculations, as CATC did, the HSC will be higher, but the number of hours over which the HSC is charged will be lower. So long as the total number of hours underlying Schedule D and Steps C through F is the same as the number of hours entered on Line 4, the operator's total recovery will equal the costs entered on Line 3.

8. CATC ordered Harron to allocate its Line 3 costs among equipment and installation charges by excluding indirect hours throughout the allocation process, rather than by including indirect hours throughout. CATC's treatment of indirect hours in Part III of FCC Form 393 was therefore reasonable and did not harm Harron.

B. Equipment Maintenance and Installation

9. Harron next contends that CATC erred by increasing the percentage of costs attributable to customer equipment maintenance and installation in Line 3, Step A (the total annual capital costs and expenses incurred for maintenance of customer equipment and installations) on Harron's FCC Form 393. Line 3, Step A is determined by multiplying Line 1, Step A (annual cost of maintenance and installation of cable facilities and services) by Line 2, Step A (customer equipment and installation percentage). Harron arrived at the Line 2, Step A percentage by dividing the number of person hours performed with respect to regulated services by the number of total work assignments completed by its installation and maintenance staff. In its order, CATC increased this figure. Part of the percentage increase was due to CATC's correction of math errors made by Harron in calculating this figure. For example, Harron obtained the yearly figure by annualizing its pro-

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[9] *See* Communications Act, § 623(b), 47 U.S.C. § 543(b).

[10] If a franchising authority required an operator to set its rates for equipment and installations below their maximum permitted levels, the operator could, in effect, be forced to provide equipment and installations at levels below actual cost.

[11] 47 C.F.R. § 76.942(a) (1993) ("a franchising authority may order a cable operator to refund to subscribers that portion of previously paid rates determined to be in excess of the permitted tier charge or above the actual cost of equipment").

[12] The HSC is calculated by computing an operator's annual capital costs plus expenses for the maintenance of customer equipment and the installation of basic tier service. That figure is then divided by the total number of person-hours spent in those activities over the past year. FCC Form 393, Instructions for Equipment and Installation Charges, Step A.

[13] CATC concluded that the positions of Manager/Supervisor and Other Technical Staff are indirectly related to regulated customer activities and therefore removed the hours associated with those positions from the total number of person hours involved in regulated customer maintenance and installation activities. That reduced the number of hours reported on Line 4, Step A. CATC also removed the corresponding overtime hours for the Other Technical Staff positions.

[14] "Equipment basket costs shall be limited to the direct and indirect material and labor costs . . ." 47 C.F.R. § 76.923(c) (1993).

ductivity data for the first four months of the calendar year. In converting this to annual data, however, Harron multiplied the data covering a period of four months by four instead of three. Harron repeated this error in its service report.[15] The remainder of the increase in the costs percentage figure was due to the addition of regulated work assignments, including relocates, reconnects and reconnects of additional outlets, which CATC concluded Harron should have included, but did not, in its calculations. Harron claims that CATC's action makes an invalid comparison between direct hours spent in connection with regulated activities with the direct and indirect hours spent in connection with allegedly unregulated activities. CATC counters that no comparison took place. Line 2, Step A, CATC continues, allows an operator to establish the cost of its equipment basket, whereas treatment of indirect hours concerns itself with allowing an operator to fully recover its equipment basket costs, which are distinct steps in the equipment calculation process.

10. CATC's correction of Harron's math errors was both proper and reasonable. Furthermore, Commission rules define regulated work assignments as those associated with providing, leasing, installing and maintaining customer premise equipment.[16] CATC's addition of the person hours associated with relocates, reconnects and reconnects of additional outlets was therefore reasonable.

C. Supply Expenses

11. Harron next contends that CATC improperly excluded some of its supply expenses from its equipment basket calculations without sufficient explanation. Harron did not, as requested, supply CATC with detailed information explaining or justifying its supply expenses. CATC therefore excluded such categories as head-end electronic repairs and outside engineering consulting because it concluded that Harron had failed to meet its burden of proof by demonstrating that these costs should be included in the equipment basket.

12. When an operator does not respond to the local franchising authority's (LFA) requests for additional, specific information within a reasonable time, then the LFA has no choice but to determine rates for the non-responsive operator on the best information available.[17] Here, CATC excluded some of Harron's supply expenses because Harron failed to meet its burden of proof under our rules by demonstrating the supply expenses should have been included.[18] In this instance, CATC's action was both appropriate and reasonable.

D. Salary and Benefit Expenses

13. Harron also disagrees with CATC's revisions to Schedule B of FCC Form 393. Specifically, under Harron's salary and benefit expenses, CATC reduced the portion of the Manager/Supervisor or Plant Manager's salary allocated to expenses for service installation and maintenance of equipment to 25% from the 34.39% figure reported by Harron in its revised Form 393. Harron reported two different salary allocation percentages for these positions, without an explanation or justification for either, on two different FCC Form 393s filed with CATC.[19] CATC therefore did not accept either allocation and instead, revised the figure to reflect the average allocation for such expenses CATC experienced with other operators.[20]

14. CATC's reallocations under Harron's salary and benefit expenses were, in this instance, reasonable. Harron presented inconsistent figures with no justification for either amount. Where an operator is unable to carry its burden by demonstrating that certain figures on its FCC Form 393 form are reasonable,[21] as Harron was unable to do here, then the LFA may revise those figures, basing them on the best information then available to it.

E. Utility Expenses

15. Harron also disagrees with CATC's revision of its utility expenses, included in Schedule B of FCC Form 393. As mentioned above, Harron filed two Form 393s with CATC and reported different utility costs on both. In its original filing, Harron submitted a utility percentage of 18.88% related to expenses for service installation and maintenance of equipment and in its revised filing, it submitted a figure of 34.39%. Since Harron did not explain which figure was more accurate and provided noexplanation for the revision, CATC weighed both figures and determined that 20% represented a reasonable figure and adjusted Harron's From 393 accordingly.

16. CATC's adjustment of Harron's utilities expenses were, in this instance, reasonable in the same way that CATC's reallocation of Harron's salary and benefit expenses was reasonable. Where an operator is unable to carry its burden of demonstrating that certain figures on its FCC Form 393 form are reasonable,[22] as Harron was unable to do here, then the LFA may revise those figures, basing them on the best information then available to it.

F. Drop Material Expenses

17. Harron next contends that CATC improperly increased its drop material expenses for primary installations on Schedule B to reflect 100% of Harron's associated costs. CATC justifies the increase on the basis that Harron did not provide documentation showing that these drop expenses included only those on the customer's side of the

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[15] Harron's original Form 393, with the errors explained above, had a figure of 18.88% listed in Line 2, Step A. After CATC pointed out the math errors at the prehearing conference, Harron resubmitted a Form 393 in which the figure had increased to 34.39%.

[16] 47 C.F.R. § 76.923(c) (1993).

[17] Harron's readiness to provide the requested information now does not affect our decision. The information must be provided to the LFA within a reasonable time after it is requested, otherwise the local rate-setting process could not function properly. *See Third Recon. Order*, 9 FCC Rcd at 4347-48.

[18] 47 C.F.R. § 76.937 (1993).

[19] *See, supra*, at footnote 15.

[20] 25% is also close to the average of the two figures that Harron reported in its first, 18.88%, and subsequent, 34.39%, FCC Form 393 filings.

[21] *See* 47 C.F.R. § 937 (1993).

[22] *Id.*

demarcation point.[23] CATC reasoned that since Harron included all labor costs associated with an installation in Schedule B that it was appropriate to include all material costs associated with an installation as well.

18. Commission rules direct operators to include in the equipment basket only those costs related to providing and maintaining customer premises equipment on the customer's side of the demarcation point, but allow them to charge for the entire labor cost of the primary installation, not just that portion inside the demarcation point.[24] CATC's decision to include all the material costs associated with the installation was therefore unreasonable. This issue is remanded to CATC with instructions to include only those costs associated with an installation from the demarcation point into the dwelling unit, a figure necessarily less than 100%.

G. Contract Converter Repair Hours

19. Harron next objects to the method CATC used to calculate the equivalent number of converter repair labor hours, on Line 4, Step A of FCC Form 393, conducted by an outside vendor. Specifically, Harron contends that CATC improperly concluded that 80% of the reported converter repair costs were attributable to labor costs. Furthermore, Harron claims that CATC improperly estimated the amount Harron spent on converter repair conducted by contract service providers for the communities of Abington and Halifax. Harron did not provide CATC with the hours associated with contract converter repair for any of the communities involved in this proceeding, although it did include expenses for all but two communities, Abington and Halifax. CATC concluded that in order to properly reflect converter repair as a direct cost, both time and expenses need to be included in HSC calculations. CATC then requested Harron to submit a revised filing or additional information that incorporated contract converter repair hours in Line 4, Step A. CATC claims that Harron did not respond to that request. During the course of its rate proceedings, CATC states that it encountered a large number of cases where operators did not include the contract converter repair hours in calculating their HSC, as in this case. The majority of those operators told CATC that they received a bill for contract labor that did not itemize labor or material components of the total bill, but the operators estimated that approximately 20% of such total bills were from material costs with the remaining 80% comprising labor costs. Based on the information provided by other Massachusetts operators, CATC divided 80% of the total cost figure supplied by Harron by a service charge of $25 to arrive at the hours of estimated repair time.[25] These hours were then added to Line 4, Step A and a corresponding change was made to Line 16, Step D. In order to complete these calculations for Abington and Halifax, CATC used contract converter repair expenses from the Bourne/Sandwich system, which Harron did supply, to estimate the amount spent on contract converter repair in Abington and Halifax. Specifically, CATC divided Harron's contract converter repair costs by the total amount spent on equipment and installation activities in the Bourne/Sandwich system to arrive at a contract labor percentage for the two communities. CATC then multiplied the resulting figures by the number that Harron listed as the total amount spent on these services for the Abington and Halifax systems. These figures were then multiplied by 80% and divided by the service charge of $25 to arrive at the hours of estimated repair time for Abington and Halifax.

20. Since instructions to FCC Form 393 state that operators should include the total number of person hours spent on maintenance of customer equipment, CATC did not err by including contract converter repair hours on Line 4, Step A. Moreover, nothing in our rules states that contract labor should be treated differently from in-house labor. The rules state that "total person hours" should be used.[26] Again, since Harron did not provide the information requested, CATC was forced to devise a methodology to estimate the converter repair hours. From its public hearings with Harron and other operators, CATC learned that operators often received a consolidated invoice, that did not itemize labor or material components, from their contractors for converters that are sent out for repairs. Since Harron did not respond to its request for more detailed information, CATC relied on the responses it received from other operators, a majority of which stated that approximately 20% of such invoice totals stemmed from material costs and 80% from labor costs. CATC then used this 80% figure to estimate the contract converter repair labor hours from the cost figure that Harron supplied. In this instance, where Harron did not provide the requested information, CATC's actions were reasonable. Likewise, since Harron did not respond to CATC's requests for information about contract labor expenses for Abington and Halifax, CATC had no choice but to estimate the expenses based on the best information available. CATC's action in this regard appears reasonable as well.

H. Refund Liability

21. Finally, Harron asserts that CATC failed to look at the aggregate of equipment and programming rates in determining refund liability.[27] Harron is correct in noting that we allow an operator to reduce any refund liability by allowing an offset between its above-permitted prices and its below-permitted prices. CATC contends, however, that it recognized this principle, but that, contrary to Harron's contention, the resulting rate adjustment may not completely reduce its refund liability.

22. After setting the various maximum rates that an operator is permitted to charge on a prospective basis, a franchising authority should then determine if the operator is liable for any subscriber refunds. A refund liability can be imposed when an operator's actual charges exceed maximum permitted levels during the applicable period of re-

[23] The "demarcation point" is the point approximately twelve inches outside of the location where the cable wire enters the subscriber's premises. 47 C.F.R. § 76.5(mm) (1993).

[24] 47 C.F.R. § 76.5(mm) (1993); FCC Public Notice, Question/Answer 35 (May 13, 1993).

[25] CATC used Harron's hourly technical wage and after allowing for overhead costs determined that a $25 hourly service rate was reasonable for the purposes of these calculations.

[26] 47 C.F.R. § 76.923(d) (1993) (The HSC shall equal the operator's annual Equipment Basket costs, excluding the purchase cost of customer equipment, divided by the total person hours involved in installing, repairing, and servicing customer equipment during the same period.).

[27] Sammons Communications, Inc., DA 94-515, 9 FCC Rcd 2518 (released May 23, 1994); TCI Cablevision of St. Louis, Inc., DA 94-424, 9 FCC Rcd 2141 (released April 29, 1994).

view.[28] If an operator's aggregate revenues computed from its actual rates exceeded its revenues computed from its permitted rates during the period of review, the LFA may order the operator to refund the difference to subscribers.[29] If the operator's aggregate revenues computed from its permitted rates exceeded its aggregate revenues computed from its actual rates, the operator will not be required to issue any refunds for that period of review. In this proceeding, any refunds to be paid by Harron should be calculated based on this method.

23. While the Commission will sustain the decisions of franchising authorities if there is a reasonable basis for doing so, we expect franchising authorities to adhere to the mathematical principles underlying the benchmark methodology, particularly when calculating an operator's refund liability.[30] For instance, in this case, CATC may not order Harron to set its equipment rates below maximum permitted levels. Further, CATC must offset or reduce any refunds it may order by the difference between the actual equipment rates that Harron charged and the maximum permitted rates that it could have charged during the applicable period of review.[31] Upon review, it appears that both Harron's and CATC's contentions regarding refund liability are raised prematurely. In its rate order, CATC merely required Harron to refund to subscribers "that portion of previously paid rates determined . . . to be in excess of the initial permitted rates . . .." Harron should be permitted to calculate its refund liability as discussed above.

III. ORDERING CLAUSES

24. Accordingly, IT IS ORDERED that Harron's Consolidated Appeal of CATC's local rate orders in the communities of Abington, Bourne, Halifax, Pembroke, Plympton, Rockland and Sandwich with regard to the local franchising authority's power to order refunds, the hourly service charge, equipment maintenance and installation costs, supply, salary and benefit and utility expenses and contract converter repair hours ARE DENIED. The issue concerning drop material expenses IS REMANDED to the Massachusetts Community Antenna Television Commission for further consideration consistent with this Consolidated Order. The issue concerning refund liability is premature and therefore IS DISMISSED. Harron's Requests for Stays are rendered moot and therefore ARE DISMISSED.

25. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by § 0.321 of the Commission's rules. 47 C.F.R. § 0.321 (1993).

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[28] *See* 47 C.F.R. § 76.942 (1993).

[29] *See Third Recon. Order*, 9 FCC Rcd at 4353 ("Although maximum permitted rates are always determined on an unbundled basis, *i.e.*, separately for program service and equipment, refund liability may stem from bundled rates. We conclude that the refund liability should be calculated based on the difference between old bundled rates and the sum of the new unbundled program service charge(s) and the new unbundled equipment charge(s).").

[30] *See Rate Order*, 8 FCC Rcd at 5731; *Third Recon. Order*, 9 FCC Rcd at 4346.

[31] *See Third Recon. Order*, 9 FCC Rcd at 4353.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

BUENAVISION TELECOMMUNICATIONS
OF BOYLE HEIGHTS, INC.

Petition for Reconsideration

of Cable Services Bureau Order
Denying Petition for Reconsideration
of the City of Los Angeles, California's
Certification to Regulate Basic Cable
Service Rates (CA1285)

ORDER ON RECONSIDERATION

Adopted: February 2, 1995; Released: February 3, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On December 27, 1994, Buenavision Telecommunications of Boyle Heights, Inc. ("Buenavision") filed a timely petition requesting reconsideration of a *Memorandum Opinion and Order*[1] (*"Order"*) adopted by the Cable Services Bureau ("the Bureau") pursuant to delegated authority. The *Order* denied Buenavision's petition for reconsideration challenging the certification of the City of Los Angeles ("the City") to regulate Buenavision's rates for basic cable service and associated equipment.[2] In its petition, Buenavision requests that the Commission grant its petition for reconsideration, find that Buenavision is subject to effective competition, and rescind the City's certification to regulate basic cable service rates.

2. Section 405 of the Communications Act of 1934, as amended, allows parties to petition for reconsideration of an order, issued by the Commission or its delegated authority.[3] Such a petition must be filed within 30 days from the date of public notice of that action.[4] To warrant consideration, a petition for reconsideration must state the specific form(s) of relief sought by the petitioner and allege with particularity the respects in which the contested action should be changed.[5] The petition should also cite findings of fact or conclusions that the petitioner believes to be in error, and indicate how the petitioner believes they should be changed.[6]

II. BACKGROUND

3. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators that are not subject to effective competition.[7] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition, unless they have actual knowledge to the contrary.[8] Certification becomes effective 30 days from the date of filing unless the Commission finds that the franchising authority does not meet the statutory certification requirements.[9] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days from the date such certification becomes effective.[10] Rate regulation is automatically stayed pending review of a timely-filed petition for reconsideration (filed pursuant to Section 76.911 of the Commission's rules) alleging the presence of effective competition.[11]

4. In its original petition for reconsideration, Buenavision argued that its Los Angeles system was subject to effective competition in its franchise area.[12] Buenavision based its claim of effective competition on the allegation that its system's subscriber penetration rate was less than 30% of the "households" in its franchise area.[13] To support its claim, Buenavision submitted a copy of its "Schedule of Subscribers and Services" which indicated that its system served 2,321 subscribers as of October 31, 1993. Buenavision also provided a copy of a "Boyle Heights Address Count" which included a list of addresses for residences, multiple dwelling units, and commercial en-

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[1] *Buenavision Telecommunications of Boyle Heights, Inc.*, DA 94-1390 (released Dec. 5, 1994).

[2] The City of Los Angeles filed its "Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Lack of Effective Competition" ("FCC Form 328") on October 13, 1993. The certification became effective on November 12, 1993.

[3] Communications Act of 1934 § 405, 47 U.S.C. § 405.

[4] Communications Act of 1934 § 405, 47 U.S.C. § 405; 47 C.F.R. § 1.106(f).

[5] 47 C.F.R. § 1.106(d)(1).

[6] 47 C.F.R. § 1.106(d)(2).

[7] Communications Act of 1934 § 623(a)(4); 47 U.S.C. § 543(a)(4).

[8] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[9] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt or administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, or the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition. 47 C.F.R. § 76.910(b). *See also* Communications Act of 1934 § 623(a)(4), 47 U.S.C. § 543(a)(4).

[10] 47 C.F.R. §§ 1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[11] 47 C.F.R. § 76.911(c).

[12] Buenavision refers to its franchise area within the City of Los Angeles as Area L or Boyle Heights.

[13] The 1992 Cable Act (Communications Act of 1934 § 623(a)(2); 47 U.S.C. § 543(a)(2)) and the Commission's rules (47 C.F.R. § 76.905(a)) provide that only the rates of cable systems that are not subject to effective competition may be regulated. One of the bases on which a cable system is deemed subject to effective competition is if fewer than 30 per cent of the households in the system's franchise area subscribe to the system's service. Communications Act of 1934 § 623(l)(1)(A); 47 U.S.C. § 543(l)(1)(A); 47 C.F.R. § 76.905(b)(1).

tities within the franchise area. This count indicated that there were 23,014 addresses within the franchise area. In addition, Buenavision provided data from the "Los Angeles County 1990 Census Population and Housing Counts by Major and Minor Statistical Areas" which indicated that there were 24,733 "dwelling units" in Boyle Heights. Using these figures, Buenavision argued that the ratio of total Buenavision subscribers in relation to the total number of "addresses" or "dwelling units" in the franchise area yielded a subscriber penetration rate of either 10.1% or 9.4% of the "households" in its franchise area, depending on which housing data was used. Because both penetration rates fell below 30%, Buenavision argued that its system was subject to effective competition, and that the City's certification to regulate Buenavision's basic cable rates and associated equipment should be rescinded.

5. In its *Order*, the Bureau denied Buenavision's petition for reconsideration because Buenavision, in deriving its penetration rate, inappropriately relied upon "dwelling unit" data, rather than household ("occupied housing unit") data, to determine the total number of households in its franchise area. Specifically, the Bureau found that Buenavision's "dwelling unit" count inappropriately included vacant housing units. In a November 21, 1994 letter to the Bureau, Buenavision acknowledged that the 24,733 total for "dwelling units" in Boyle Heights did not exclude vacant housing units, and that it was impossible for Buenavision to base its count of households on data that excluded vacant housing units. The Bureau also found that Buenavision could not rely on its address count to support its claim because Buenavision did not indicate whether the address count excluded vacant housing units. Moreover, the address count inappropriately included commercial addresses. Because Buenavision failed to base its claim on "household" or "occupied housing unit" data, the Bureau rejected Buenavision's claim of effective competition.

6. In its petition, Buenavision now argues that use of recently located "household" (occupied housing unit) data confirms that its system's penetration level falls below 30%. Specifically, Buenavision submits a copy of the Los Angeles County Department of Regional Planning Census data which demonstrates that there are 23,895 occupied housing units in Buenavision's franchise area. In addition, Buenavision submits updated subscribership data which indicates that Buenavision serves a total of 2,563 subscribers as of December 1, 1994. This yields a penetration level of 10.7%. Buenavision argues that the public interest warrants acceptance of this new data because it demonstrates that Buenavision is subject to effective competition based on an extremely low penetration level.

III. DISCUSSION

7. Generally, reconsideration is appropriate where the petitioner shows either a material error or omission in the original order or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters.[14] A petition for reconsideration which relies on facts or information not previously presented to the Commission or its delegated authority may be considered if the Commission or designated authority determines that consideration of such facts is required in the public interest.[15]

8. In its original petition, Buenavision based its effective competition claim on addresses and dwelling unit data which inappropriately included vacant housing units. In this petition, however, Buenavision now submits household (*i.e.*, occupied housing unit) data in support of its effective competition claim.[16]

9. Relying on this household data, we find that, at most, Buenavision currently serves 2,563 subscribers in an area with 23,895 households (*i.e.*, occupied housing units). This yields a penetration level of 10.7%. In light of this, we find that Buenavision has submitted sufficient evidence demonstrating that it serves fewer than 30% of the households in its franchise area. Accordingly, its cable system is subject to effective competition and its petition is granted.

Other Matters

10. In its petition, Buenavision also argues that the Bureaus's *Order* is based on material errors. As Buenavision has now submitted sufficient evidence demonstrating that its cable system is subject to effective competition, it is unnecessary to address these additional arguments.

IV. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED that the petition for reconsideration, filed by Buenavision Telecommunications of Boyle Heights, Inc. challenging the Cable Services Bureau Order Denying the Petition for Reconsideration of the City of Los Angeles, California's Certification to Regulate Basic Cable Service Rates, IS GRANTED.

12. IT IS FURTHER ORDERED that the certification of the City of Los Angeles, California to regulate Buenavision Telecommunications of Boyle Heights, Inc.'s basic cable service rates IS RESCINDED.

13. This action is taken under delegated authority pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321.

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[14] *WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966). *See also* 47 C.F.R. § 1.106(c).

[15] 47 C.F.R. § 1.106(c)(2).

[16] Buenavision provides no adequate reason as to why it failed to submit this data in its original petition and thus this pleading more properly resembles a petition for revocation. Buenavision claims that it had no notice that effective competition claims must be demonstrated by using "household" (*i.e.*, occupied housing unit) data. This argument lacks merit. Both the Cable Act and the Commission's rules require that effective competition be demonstrated based on the number of "households" in the franchise area. Communications Act of 1934 § 623(l)(1), 47 U.S.C. § 543(l)(1); 47 C.F.R. § 76.905 (b). As the Commission stated previously, "we presume that Congress did not intend 'households' to have a different meaning than in the 1990 Census that would include vacant units." *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (*"Third Recon. Order"*). The count of "households" in the 1990 Census reflects only occupied housing units. *See* Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8. Nonetheless, we note that Section 623(a)(2) of the Communications Act of 1934, as amended, provides that only the rates of cable systems that are not subject to effective competition may be regulated. Moreover, we note that acceptance of this new data reveals that Buenavision's penetration level is substantially below the penetration level needed to become subject to rate regulation. In light of these circumstances, we believe that the public interest requires acceptance of this information.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Community TV Corporation

Appeal of Franchising
Authority's Resolution and Order
Regulating Basic Cable Rates
in the Town of Alton, New Hampshire

ORDER

Adopted: February 3, 1995; Released: February 6, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Community TV Corporation ("Community"), the franchisee in the above matter, filed on November 30, 1994 a Petition For Review of Rate Order adopted on October 31, 1994 by its local franchising authority, the Town of Alton, New Hampshire ("Alton").[1] The rate order establishes a new regulated rate schedule for Community's basic service tier rates and associated equipment. Specifically, Alton's rate order requires Community to implement certain rate reductions and to issue refunds to subscribers for overcharges dating back to September 1, 1993.

2. In its review of Community's Form 393, Alton found that Community accurately calculated the maximum permitted rates set forth in its Form 393 and ordered Community to provide refunds to subscribers for overcharges resulting from Community charging actual rates in excess of the maximum permitted rates for certain services and equipment.[2] Community argues that Alton's rate order ignores the Commission's instructions for the calculation of refunds, which it asserts require that its overcharges be offset by its undercharges. Specifically, it asserts it should be allowed to offset its overcharges for basic cable service with its undercharges for addressable converters. Community provided its subscribers addressable converters free of charge. Community's maximum permitted rate for converters is listed on its Form 393 as $1.15 per month, while its actual charge is listed as $0.00 per month. Community also appealed on the ground that Alton imposed refund liability for a period longer than the one-year period permitted by 47 C.F.R. §§ 76.942(b) and (c)(1). Alton did not file a response to either of Community's petitions.

3. Under our rules, rate orders made by local franchising authorities may be appealed to the Commission.[3] In ruling on appeals of local rate orders, the Commission will not conduct a *de novo* review, but instead will sustain the franchising authority's decision as long as there is a reasonable basis for that decision.[4] Therefore, the Commission will reverse a franchising authority's decision only if it determines that the franchising authority acted unreasonably in applying the Commission's rules in rendering its local rate order.[5] If the Commission reverses a franchising authority's decision, it will not substitute its own decision but instead will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission's decision on appeal.[6]

II. DISCUSSION

A. Calculation of Refunds

4. FCC Form 393 is the official form used by regulators to determine whether an operator's regulated rates for programming, equipment and installations were reasonable during the timeperiod from September 1, 1993 until May 14, 1994.[7] Form 393 is divided into three separate, but interrelated parts. In Part II, the operator calculates its maximum permitted programming rates, while in Part III, the operator calculates its maximum permitted equipment and installation rates. Part I is a cover sheet that lists the various programming, equipment and installation rates that have been calculated in Parts II and III and compares them to the rates the operator has actually charged during the period of review.

5. The operator's maximum permitted rates are derived by completing Parts II and III of the Form 393, pursuant to which the operator calculates the actual aggregate revenues collected by the operator for regulated programming, equipment and installation, as of the initial date of regulation ("current rate") or as of September 30, 1992.[8] After calculating actual aggregate revenues, the operator converts those revenues to a per-channel rate, and then compares the per-channel figures to the applicable benchmark rate. If an operator's current per-channel rate level is below the applicable benchmark rate, then the operator's rate level is

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[1] Along with its Petition for Review of Rate Order, Community also filed a Petition for Stay Pending Review on November 30, 1994. Because we are resolving this dispute on the merits presented in the appeal, the petition for stay has been rendered moot.

[2] Specifically, Alton ordered refunds for installations in prewired homes; installation of additional connections at time of initial installation; field change of services; and remote control rentals.

[3] *See* 47 C.F.R. § 76.944.

[4] *See Report and Order and Further Notice of Proposed Rulemaking in MM Docket 92-266*, 8 FCC Rcd 5631, 5731 (released May 3, 1993) (*"Report and Order"*); *Third Order on Reconsideration in MM Docket 92-266*, 9 FCC Rcd 4316, 4346 (released March 30, 1994) (*"Third Recon. Order"*).

[5] *Id.*

[6] *Id.*

[7] To the extent that an operator has sought to take advantage of the refund deferral period available under the *Second Order on Reconsideration, Fourth Report an Order, and Fifth Notice of Proposed Rulemaking in MM Docket 92-266*, 9 FCC Rcd 4119, 4183-4185 (1994), the maximum permitted rates determined under Form 393 may also apply from May 15, 1994 until the date that the operator implemented its new rates, as determined under the Form 1200 series.

[8] An operator must calculate its rate in effect on September 30, 1992, only if its current rate level is above the benchmark rate. If an operator's current rate is at or below the benchmark rate, it is not required to calculate its September 30, 1992 per-channel rate.

deemed reasonable, but it must remain at its current level. If its current per-channel rate exceeds the benchmark rate, the operator must then compare its September 30, 1992 per-channel rate level to the applicable benchmark rate. If its September 30, 1992 per-channel rate level is above the benchmark rate, it must reduce this rate to the benchmark rate or by 10%, whichever reduction is less. Maximum permitted rates for equipment and installation are based on actual cost and are calculated in Part III of the Form 393. In this proceeding, Alton found that the maximum permitted rates calculated by Community in its Form 393 were "reasonable," but did not provide for the possibility of offsetting Community's undercharges for addressable converters against its service and equipment overcharges.[9]

6. After determining the various maximum rates that an operator is permitted to charge on a prospective basis, a franchising authority should then determine if the operator is liable for any subscriber refunds. A refund liability can be imposed when an operator's actual charges exceed maximum permitted levels during the applicable period of review.[10] If an operator's aggregate revenues computed from its actual rates exceed its revenues computed from its permitted rates during the period of review, the operator must refund the difference to subscribers.[11] If the operator's aggregate revenues computed from its permitted rates exceed its aggregate revenues computed from its actual rates, the operator will not be required to issue any refunds for that period of review. In this proceeding, any refunds to be paid by Community should be calculated based on this method.

7. While the Commission will sustain the decisions of franchising authorities if there is a reasonable basis for doing so, we expect franchising authorities to adhere to the mathematical principles underlying the benchmark methodology, particularly when calculating an operator's refund liability.[12] In this case, Alton must offset or reduce any refunds it may order by the difference between the actual equipment rates that Community charged and the maximum permitted rates that it could have charged during the applicable period of review.[13] According to Community's uncontested submission, Alton has directed Community to issue refunds without regard to the fact that some rates are below maximum permitted levels. We are remanding this issue to Alton so that it can enter a ruling consistent with these findings.

B. Refund Liability Period

8. Alton's rate order, issued on October 31, 1994, requires Community to issue refunds from September 1, 1993 through May 14, 1994. The effect of the rate order is to impose refund liability for rates charged fourteen months prior to the issuance of the order. Our rules, however, provide that an operator's liability for refunds is limited to a one-year period, which generally runs from the date the operator implements a prospective rate reduction back to no more than one year or to September 1, 1993, whichever period is shorter.[14] If an operator fails to comply with and does not implement a rate order, our rules provide that the one-year period will run back from the effective date of the rate order.[15] The operator in such a case is also responsible for refund liability which accrues until the operator complies with the rate order.

9. Neither party has indicated the effective date of the rate order or whether Community complied with the rate order and rate reduction. However, Community could not have complied with the rate order any earlier than October 31, 1994, the date the order was issued, therefore, the effective date of the rate order could not be any earlier than October 31, 1994. Thus, under either circumstance, Community's refund liability would not begin earlier than October 31, 1993. We remand this portion of Community's Appeal to Alton so that it can enter an order consistent with our rules.

III. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED that Community TV Corporation's appeal of The Town of Alton's local rate order, regarding the issue of Community's permitted charges for equipment and related refunds is REMANDED to the local franchising authority for resolution in accordance with the terms of this Order.

11. IT IS FURTHER ORDERED that Community TV Corporation's appeal of The Town of Alton's local rate order, regarding the issue of refund liability period approved by the Town is REMANDED to the local franchising authority for resolution in accordance with the terms of this Order.

12. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[9] Petition for Review of Rate Order, Exhibit I at 1.

[10] *See* 47 C.F.R. § 76.942.

[11] *See Third Recon. Order* at 4353 ("Although maximum permitted rates are always determined on an unbundled basis, *i.e.*, separately for program service and equipment, refund liability may stem from bundled rates. We conclude that the refund liability should be calculated based on the difference between old bundled rates and the sum of the new unbundled program service charge(s) and the new unbundled equipment charge(s).").

[12] *See Report and Order* at 5731; *Third Recon. Order* at 4346.

[13] *See Third Recon. Order* at 4353.

[14] 47 C.F.R. §§ 76.942(b) and (c)(1).

[15] 47 C.F.R. §§ 76.942(b).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Petition of Public Utilities Commission, State of Hawaii, for Authority to Extend Its Rate Regulation of Commercial Mobile Radio Services in the State of Hawaii	**PR Docket Nos. 94-103, 94-105, 94-106, 94-108.**
Petition of the State of California and the Public Utilities Commission of the State of California to Retain Regulatory Authority over Intrastate Cellular Service Rates	
Petition of the Connecticut Department of Public Utility Control to Retain Regulatory Control of the Rates of Wholesale Cellular Service Providers in the State of Connecticut	
Petition to Extend Rate Regulation Filed by the New York State Public Service Commission	

ORDER

Adopted: January 25, 1995; Released: January 25, 1995

By the Chief, Wireless Telecommunications Bureau:

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I. INTRODUCTION

1. On August 10, 1993, Congress enacted the Omnibus Budget Reconciliation Act of 1993 (Budget Act), amending Section 332 of the Communications Act of 1934, which, *inter alia*, preempts state and local regulation of the rates and entry of commercial mobile radio services (CMRS).[1] The amended statute enables states to petition the Federal Communications Commission (Commission) for continued or new regulatory authority over the rates of intrastate CMRS offerings. In 1994, the Commission adopted rules for states to follow in submitting their petitions.[2] These rules describe types of "evidence, information and analysis" considered pertinent to the Commission's examination of market conditions and consumer protection.[3]

2. Eight states filed petitions by August 8, 1994, pursuant to the amended Communications Act, seeking to retain their ability to regulate CMRS rates. The Commission must complete all action on each petition, including any reconsiderations, within 12 months after the petition was filed.[4] Dockets were established to govern disposition of these petitions in an orderly fashion.[5]

3. In four of the eight proceedings, states have sought confidential treatment of materials submitted to support their petitions: those filed by the People of the State of California and the Public Utilities Commission of the State

[1] *See* Omnibus Budget Reconciliation Act of 1993 (Budget Act), Pub. L. No. 103-66, § 6002(c)(3), 107 Stat. 312, 394 (1993) (*codified at* Section 332(c)(3) of the Communications Act of 1934 ("the Act"), 47 U.S.C. § 332(c)(3)).

[2] 47 C.F.R. §20.13(a); Second Report and Order, Implementation of Sections 3(n) and 332 of the Communications Act, GEN Docket No. 93-252, 9 FCC Rcd 1411, 1504-05 ¶ ¶ 250-52 (1994) ("Second Report and Order").

[3] *Id.*, ¶ 252.

[4] 47 U.S.C. § 332(c)(3)(B). While petitions for reconsideration of the Second Report and Order are pending, the Commission's decisions in that item remain in force, pursuant to the authority of Section 405 of the Communications Act, 47 U.S.C. § 405.

[5] *See* Public Notice, FCC Announces Establishment of Dockets for Materials Filed In Connection With State Petitions for Authority to Regulate Commercial Mobile Radio Service Rates, DA No. 94-1043 (Sept. 22, 1994).

of California (collectively, "CPUC" or "California"); by the Connecticut Department of Public Utility Control ("DPUC" or "Connecticut"); by the Public Utilities Commission of the State of Hawaii ("HPUC" or "Hawaii"); and by the New York Department of Public Service ("NYDPS" or "New York"). This Order addresses confidentiality issues arising from those petitions. In general, these states request confidential treatment of supporting materials because they obtained these records subject to confidentiality claims of carriers that oppose the states' substantive petitions. This Order determines the status of materials for which confidential status was requested by California and establishes procedures for treatment of such materials. The same procedures will be applied to materials submitted by Hawaii and New York if they choose to supplement their petitions.

II. SUMMARY OF DECISION

4. California requested confidential treatment under Section 0.459 of the Commission's Rules for several elements of commercial and financial data that it submitted under seal with the Commission and redacted from its publicly filed petition. We have categorized the California data into three groups (A, B, and C), which are defined by the confidential nature of the data, as a result of subsequent consultations with the parties, including a group of six parties, affiliated with cellular companies, that submitted a draft protective order on December 22, 1994 (unlike these acceding parties, other carriers have remained silent, and US West has continued to categorically oppose filing or reliance upon any confidential materials).[6] The six acceding parties have withdrawn any claims for confidential treatment for naterials in Group A. These parties have acceded to limited disclosure under terms of a protective order for materials in Group B. These parties still assert unqualified claims of confidentiality (*i.e.*, they oppose any form of disclosure) for materials in Group C. In this Order, we permit disclosure of the Group A materials,[7] adopt a Protective Order (set forth in Appendix A) to be applied to materials in Group B, and determine that materials in Group C need not be considered for confidential treatment at this time.

5. Connecticut initially submitted supporting materials accompanied by two requests for confidential treatment, but failed to comply with the Commission's procedural rules. On January 20, 1995, Connecticut re-submitted its request, apparently in compliance with Commission Rules.[8] We will address any confidential materials in this recent submission by issuing a decision that will be informed by our analysis of similar materials in this Order. After the initial Connecticut requests were filed, two Connecticut cellular companies filed rate of return materials accompanied by requests for confidential treatment. These carriers ask for limited disclosure of their materials under a protective order already in force in Connecticut.[9] Because the parties to the state proceeding before the DPUC indicated their willingness to be bound by the protective order in the state proceeding, we adopt that protective order, set forth in Appendix B with minor revisions to accommodate this Federal proceeding, for application only to the BAMMC and Springwich submissions in PR Docket No. 94-106.

6. Hawaii and New York offered to supplement their petitions with confidential materials provided that they received advance assurances of "appropriate" treatment.[10] These two states did not in fact submit such supplemental materials, but offered to provide such materials if assured of confidential treatment by this Commission. Thus, the immediate focus of our confidentiality review is limited to California, although our findings here will guide the Bureau's disposition of future supplemental requests for confidential treatment of materials in the proceedings under Section 332(c)(3) of the Communications Act, as amended. In this Order we provide Hawaii and New York with a final opportunity to supplement their petitions, consistent with Commission requirements, with materials that, if confidential, will be disclosed under terms of the Protective Order attached as Appendix A.

III. REQUESTS FOR CONFIDENTIAL TREATMENT

A. Requests for Confidential Treatment

7. *California.* As noted, California submitted with its petition[11] various supporting materials for which it sought confidential treatment[12] under Section 0.459 of the Commission's Rules.[13] The confidentiality request was amended by the CPUC's September 14, 1994 and September 16,

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[6] The six acceding parties are AirTouch, BellSouth, CCAC, L.A. Cellular, GTE, and McCaw. *See infra* ¶ 8 for a description of data in each category.

[7] Group A materials related to US West, however, as well as the other carriers that did not withdraw their claims of confidentiality, are subject only to limited disclosure pursuant to protective order, as discussed further *infra* .

[8] *See* letter from M. Kohler, Assistant Attorney General, State of Connecticut, to W. Caton, Acting Secretary, Federal Communications Commission, PR Docket No. 94-105, dated Jan. 9, 1995, filed Jan. 20, 1995 ("Third Connecticut Request").

[9] *See* BAMMC, Request for Non-Disclosure of Confidential and Proprietary Financial Information, PR Docket No. 94-106 (Nov. 8, 1994) ("BAMMC Request"); Springwich, Request for Non-Disclosure of Confidential and Proprietary Financial Information, PR Docket No. 94-106 (Sept. 19, 1994) ("Springwich Request").

[10] *See* Hawaii, Petition for Authority to Extend Rate Regulation of Commercial Mobile Radio Services in the State of Hawaii (Hawaii Petition) at 6; New York, Petition to Extend Rate Regulation (New York Petition) at 7.

[11] *See* California, Petition to Retain Regulatory Authority Over Intrastate Cellular Service Rates (California Petition).

[12] California requested "proprietary" treatment of materials, but as it referenced Sections of the Commission's Rules governing requests for "confidential" treatment, we refer to the filing as a request for confidential treatment of materials.

[13] *See* California, Request for Proprietary Treatment of Documents Used in Support of Petition to Retain Regulatory Authority Over Intrastate Cellular Service Rates, PR Docket No. 94-105 (filed Aug. 9, 1994) ("California Confidentiality Request"); letter from E. Levine, CPUC, to R. Harrison, Land Mobile & Microwave Div., Priv. Rad. Bur., dated Sept. 13, 1994, filed Sept. 14, 1994, at 2 ("September 14 submission"); letter from E. Levine to R. Harrison, dated Sept. 16, 1994, filed Sept. 16, 1994 ("September 16 submission").

1994 submissions[14] updating the request in order to exclude materials that are publicly available (collectively, "Request"). The materials filed under seal were redacted from the public version of the California petition.

8. As described in the summary, we have divided these materials into three groups for purposes of reference. California seeks confidential treatment of materials on pages 29-34, 40-41, and 51-54 and in Appendices E, H, J, and M of its Petition. California cites as its bases for nondisclosure Sections 0.457(c) and 0.457(d) of the Commission's Rules, 47 C.F.R. §§ 0.457(c) and 0.457(d),[15] which parallel Exemptions 3 and 4 of the FOIA.[16] These provisions respectively exempt from mandatory disclosure materials specifically exempted from disclosure by statute, and privileged or confidential trade secrets and commercial or financial information.[17] California asserts that these records were filed with the CPUC by cellular carriers subject to claims that the data were commercially sensitive and proprietary. In addition, California requests confidential treatment for materials referenced on pages 42, 45, and 75 of its Petition, which we refer to as the "AG Excerpts," citing as the bases for nondisclosure Sections 0.457(c) and 0.457(e) of the Commission's Rules, 47 C.F.R. §§ 0.457(c) and 0.457(e), which parallel Exemptions 3 and 5 of the Freedom of Information Act, 5 U.S.C. § 552(b)(3), (5) ("FOIA").[18] California asserts that these latter materials were submitted to the CPUC by the state Attorney General's office, which acquired them in the course of an ongoing antitrust investigation and submitted them to the CPUC on condition that they would not be disclosed publicly without the Attorney General's consent.[19] Six parties affiliated with cellular interests (carriers and trade associations), the "six acceding parties," recently withdrew such claims in part for some of the materials and entirely for others.[20] US West and other, smaller carriers notably did not join this group of parties.

"Group A" materials are data, set forth in Appendix H of the California petition, for which the six acceding parties have entirely withdrawn their claims of confidentiality. The Group A materials include:

- Annualized per-subscriber data including revenues, operating expenses, operating income, and expenditures for plant;[21]
- Annualized subscriber growth for each carrier.[22]

"Group B" materials are those for which the six acceding carriers partially withdrew their claims of confidentiality, in that they accede to limited disclosure of the materials under a protective order. The Group B materials include:

Information regarding cellular carriers' and resellers' market shares -- including, for example, the individual wholesale market shares of certain cellular licensees in certain years,[23] the combined cellular licensees' market share in specific markets,[24] the aggregate market share held by resellers in the combined San Francisco and Los Angeles markets,[25] and resellers' annual percentage decline in market share for each market;[26]

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[14] *See* September 14 submission, *supra* note 3; September 16 submission, *supra* note 3.

Publicly available information is not protected under Exemption 4. See CNA Financial Corp. v. Donovan, 830 F.2d 1132, 1154 (D.C. Cir. 1987) ("[t]o the extent that any data requested under FOIA are in the public domain, the submitter is unable to make any claim of confidentiality."); Occidental Petroleum Corp. v. SEC, 873 F.2d 325, 342 (D.C. Cir. 1989).

[15] Section 0.457(c) provides that records not routinely available for public inspection include:

> Materials that are specifically exempted from disclosure by statute (other than the Government in the Sunshine Act, 5 U.S.C. 552 b): Provided, That such statute (1) requires that the materials be withheld from the public in such a manner as to leave no discretion on the issue, or (2) establishes particular criteria for withholding or refers to particular types of materials to be withheld.

47 C.F.R. § 0.457(c).

Section 0.457(d) provides that records not routinely available for public inspection include "[t]rade secrets and commercial or financial information obtained from any person and privileged or confidential, 5 U.S.C. 552(b)(4) and 18 U.S.C. 1905." 47 C.F.R. § 0.457(d)(2)(i).

[16] *See* September 14 Submission, at 1. California initially sought confidential treatment, in addition, of materials that it later conceded were publicly available. California filed an amended version of its public petition, containing those formerly redacted materials, located on pages 34-35, 40-42, 43-44, and 49 of its Petition, and in Appendices I and, in part, J. *See* September 14 Submission, September 16 Submission.

Exemption 4 of the FOIA exempts from mandatory disclosure "trade secrets and commercial or financial information obtained from any person and privileged and confidential." 5 U.S.C. § 552(b)(4).

Exemption 3 of the FOIA exempts from mandatory disclosure material "specifically exempted from disclosure by statute . . . ." 5 U.S.C. § 552(b)(3).

[17] *Id.*

[18] *See* September 14 submission; September 16 submission; *see also* 47 C.F.R. §§ 0.457(c), (e); 5 U.S.C. §§ 552(b)(3), (5).

Exemption 3 of the FOIA exempts from mandatory disclosure material "specifically exempted from disclosure by statute . . . ," and Exemption 5 exempts "inter-agency or intra-agency memorandums or letters which would not be available by law to any party other than an agency in litigation with the agency." *See* 5 U.S.C. §§ 552(b)(3), (5).

[19] *See* California Confidentiality Request, at 2-3; September 14 Submission, at 2.

[20] *See* letter of D. Gross, filed in PR Docket No. 94-105 on Dec. 20, 1994, regarding meeting on that date between counsel for the carriers and Commission staff ("Carriers' December 20 filing"); *see also* letter of D. Gross and K. Abernathy, counsel for AirTouch, filed in PR Docket No. 94-105 on Dec. 22, 1994 (signed in addition by counsel for BellSouth Cellular Corporation, CCAC, L.A. Cellular, GTE, and McCaw, and attaching suggestions for revision of the Commission's draft protective order) ("Carriers' December 22 filing").

[21] California Petition at App.

[22] *Id.*

[23] *See* California Petition at 29, App. E.

[24] *Id.* at 32, App. E.

[25] *Id.* at 30, App. E.

[26] *Id.*

California's computation of the Herfindahl (H) Index for each market;[27]

- Capacity utilization statistics, including percentages of cell sectors in certain Metropolitan Statistical Areas (MSAs) that California asserts were underutilized in certain years, and California's computation of capacity utilization rates;[28]
- The number of subscribers provided with service by each carrier on each specific basic rate plan;[29]
- The aggregate number of customers associated with all discount plans of a given carrier;[30]

"Group C" materials are certain data, found in Appendix J of the California petition, for which the six acceding carriers maintain their claims of unlimited confidentiality. The Group C materials include:

- The number of subscribers provided with service by each carrier on each specific discount rate plan.[31]
- Materials, referenced in the California petition, that were obtained by CPUC from the state attorney general's office.

9. *Connecticut.* The Connecticut Department of Public Utility Control ("DPUC" or "Connecticut") initially requested confidential treatment of large volumes of the record from its investigation of the Connecticut cellular market.[32] We returned these materials to the state because its request did not segregate the allegedly confidential materials from publicly available and non-confidential information, nor identify the allegedly confidential materials, in accordance with Section 0.459(a) of the Commission's Rules, 47 C.F.R. § 0.459(a). Moreover, Connecticut did not describe the basis for its assertion that some or all of the submitted materials were confidential, as required by Section 0.459(b) of the Commission's Rules, 47 C.F.R. § 0.459(b), nor was the request filed with the Commission's Secretary in accordance with Section 1.4(f) of the Commission's Rules, 47 C.F.R. § 1.4(f). Connecticut subsequently returned with a revised request for confidential treatment and segregated accompanying materials.[33] This latest submission appears to remedy the defects of the prior Connecticut filings.

10. In addition, the two cellular licensees in Connecticut that are parties to this Federal proceeding, Bell Atlantic Metro Mobile Companies ("BAMMC") and Springwich Cellular Limited Partnership ("Springwich"), requested confidential treatment of rate of return data and analyses submitted to this Commission under seal.[34]

11. *Hawaii.* Hawaii states in its Petition that information regarding the number of customers of each CMRS company in the State is unavailable, due to those companies' reluctance to provide the HPUC with subscriber data absent a guarantee that the information will be protected from disclosure to other regulated companies.[35] Hawaii neither submits any information under seal nor formally requests confidential treatment of information. The HPUC makes no reference to the Commission's Rules governing confidential treatment of information or the Freedom of Information Act, nor does Hawaii assert that the number of subscribers is commercially sensitive.

12. *New York.* New York states in its Petition that carriers submit their "operating expenses and revenues, plant investment, and organizational and pricing information" to the NYDPS, which in turn compiles those data into annual reports.[36] New York is willing to submit the information gathered for its 1993 report on the status of cellular competition, but asserts that it will only file such information "pursuant to appropriate safeguards."[37] The NYDPS does not specify the safeguards to which it refers,[38] nor does it explain why it considers this information confidential. Such an explanation is necessary to satisfy Section 0.459(b) of the Commission's Rules, 47 C.F.R. § 0.459(b), which requires a statement of the reasons for nondisclosure and of the facts underlying the request for proprietary treatment.

B. Comments

13. The only comments received regarding confidentiality address the California request. The National Cellular Resellers Association (NCRA) has moved that the material be either disclosed or made available for review under a protective order, so as to provide sufficient opportunity for public comment on the California Petition.[39] Conversely, Nextel, a Specialized Mobile Radio licensee, asserts that there is adequate evidence in the public record to support continued intrastate rate regulation of cellular service providers.[40]

14. Facilities-based cellular carriers, on the other hand, have filed oppositions, and the Cellular Carriers Association of California filed a motion, contending that the state petition should be dismissed for failure of the state to sustain its burden of proof, as the material subject to confidentiality claims cannot be part of the proceeding's record because the state has issued no order releasing this material to the public (i.e., to the Commission).[41] Further, the carriers argued that without disclosure of the redacted

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[27] *See* California Petition at 33-34. Note that California discusses the Herfindahl Index (H Index), which differs by a factor of 10,000 from the Herfindahl-Hirshman Index (the HHI).

[28] *See* California Petition at 51-53, App. M. California states that in the CPUC investigation of the wireless industry, the Administrative Law Judge (ALJ) has agreed to treat these materials as confidential. *See* California Confidentiality Request, at 2; September 14 Submission app. (California Administrative Law Judge's Ruling Granting in Part Motions for Confidential Treatment of Data, I.93-12-007, at 6 (capacity utilization data not included in list of materials to be publicly disclosed)).

[29] *See* California Petition, App. J.

[30] *See id.*

[31] *See* California Petition, App. J.

[32] On November 20, 1994, Connecticut delivered two Requests for Confidential Treatment of Materials to a Commission staff attorney. The second Request asked for confidential treatment of what appeared to be the entire docket of the state's Investigation into the Connecticut Cellular Service Market and the Status of Competition, Connecticut Department of Public Utility Control Docket No. 94-03-27. These requests were not filed with the Office of the Secretary.

[33] *See* Third Connecticut Request.

[34] *See* BAMMC Request; Springwich Request.

[35] *See* Hawaii Petition, at 6.

[36] *See* New York Petition at 7.

[37] *Id.* New York states, "should the [Commission] require specific information to make its determination, the company-specific information will be provided pursuant to appropriate safeguards." New York Petition at 7.

[38] *Id.*

[39] *See* NCRA Request for Access under a Protective Order, at 2.

[40] Nextel Reply at 15-16 & n.27.

[41] *See* AirTouch Opposition at 8 n.14, 9 (also contending that carriers' due process rights and parties' right to respond were

information, interested parties are deprived of an opportunity to comment on data that may form the basis for the Commission's ultimate decisions on the merits in this proceeding.[42] These parties contended that such an opportunity is required by Commission Rules, due process considerations, and the Administrative Procedure Act.[43] The cellular licensees did not seek full public disclosure of the redacted materials, however, because they contended that the data is indeed competitively sensitive.[44]

15. Initially, facilities-based California cellular carriers asserted generally that all of the data redacted by California is competitively sensitive, and its disclosure would lead to competitive injury.[45] The Cellular Carriers Association of California (CCAC), for example, asserted that subscriber and rate plan information is proprietary and sensitive and could be used to carriers' competitive disadvantage.[46] CCAC also contended that disclosure of aggregate numbers of subscribers (wholesale and retail) in total and on discount and basic rate plans, and rate plan information would permit competitors to tailor their marketing approaches to certain market groups, a strategy not possible in a truly competitive market.[47] CCAC asserted, for example, that competitors could copy successful rate plans, and that, if competitors learn which cell sites are most congested, they might target those areas for new advertising campaigns.[48] BACTC and LACTC argued that licensees' interest in nondisclosure outweighs NCRA's interest in viewing the data[49] and the government's interest in weighing this information in its decision on the merits.[50]

16. In addition, BACTC and GTE contended that the redacted data is not important to the CPUC's presentation or to the Commission's record.[51] GTE asserted that data indicating a decline or increase in market share are irrelevant to the competitiveness of a market, and that market share data does not indicate that a carrier earned a given share of the market due to failure of market competition.[52] GTE also contended that the information regarding total numbers of subscriber units, used by California to compare the relative success of carriers' offerings, reflects carrier growth without indicating how carriers competed for subscribers or why subscribers chose particular carriers.[53] The redacted financial data, GTE asserted, could illustrate a carrier's comparative management ability, rather than the extent of structural competition.[54] Similarly, GTE stated, the number of customers per rate plan does not illustrate levels of competition nor whether carriers are colluding or otherwise engaged in anticompetitive cooperation.[55] GTE also stated that there is no nexus between competition and cellular system capacity utilization.[56]

17. AirTouch, BellSouth Cellular, CCAC, L.A. Cellular, McCaw, and GTE, however, recently agreed to unlimited disclosure of the per-subscriber financial information and subscriber growth percentages for 1989-93, found in Appendix H to the California petition (the "Group C materials").[57] These carriers also agreed to limited disclosure of the "Group B" materials, pursuant to protective order, provided that the materials in Appendix J of the California Petition are aggregated by this Commission or the CPUC prior to disclosure (except that these carriers did not object to disclosure, without aggregation, of the total numbers of customers for each market on all basic rate plans and the total numbers of customers for each market on all non-basic rate plans).[58] These carriers nevertheless maintained their objection to disclosure on any other basis of the "Group C" data, consisting of the number of subscribers on each carrier's specific discount plans, in Appendix J, and also their categorical objection to disclosure in any form of the materials on pages 42, 45, and 75 of the California Petition (materials that California asserts were gathered in the course of the state Attorney General's investigation of the cellular industry).

18. California argues that any potential lack of opportunity to respond to redacted materials is a crisis of the carriers' own making.[59] The licensees voluntarily chose to forego this opportunity, the CPUC contends, as not one facilities-based carrier asked to review these materials under protective order or any other arrangement.[60] Furthermore, California argues, its own due process rights would be violated if the redacted data cannot be considered notwithstanding its relevancy and materiality to the CPUC

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violated because the CPUC's September 14th disclosures were submitted only two days before the deadline for filing responses to the Petition); Bay Area Cellular Telephone Company (BACTC) Opposition at 6, 3; CCAC Opposition at 107; Cellular Carriers Association of California Motion to Reject Petition or, Alternatively, Reject Redacted Information (Sept. 19, 1994) (CCAC Motion) at i-ii, 2, 8-16; L.A. Cellular Response to Petition at 6, 8 & n.7; McCaw Opposition at 28-29. *Cf.* AirTouch Opposition to NCRA Request, at 2-4, 9 (asserting that NCRA fails to state any justification for disclosure, and that the record as it stands is sufficient to permit the Commission to render a decision).

[42] *Id.*

[43] *Id.*

[44] *See, e.g.,* AirTouch Opposition at 9; CCAC Motion at 16-18.

[45] *See, e.g.,* AirTouch Opposition at 9; CCAC Motion at 16-18; AirTouch Opposition to NCRA Request for Access, at 1-2, 5-8; Bay Area Cellular Telephone Company (BACTC) Opposition to NCRA Request for Access, at 4-6; CTIA Opposition to NCRA Request, at 1-3; Los Angeles Cellular Telephone Company (LACTC) Opposition to NCRA Request for Access, at 5-8.

[46] CCAC Motion at 16-18.

[47] *Id.*

[48] CCAC Opposition to NCRA Request for Access, at 4-6. CCAC also notes that it provided this Commission with a study of the California cellular market that aggregates cellular rate trend information, and states that therefore the public record is sufficient to enable the Commission to make findings on the issues of the extent of cellular competition and the reasonableness of cellular rates, rather than resorting to an examination of the specific data submitted by California and public disclosure of the specific data. *Id.*, at 8-10.

[49] *See also* CTIA Opposition to NCRA Request for Access, at 1-3 (NCRA's request is not sufficiently supported); LACTC Opposition to NCRA Request for Access, at 4-5; GTE Informal Comment, by letter dated Oct. 27, 1994 ("GTE Informal Comment").

[50] BACTC Opposition to NCRA Request, at 12-15; LACTC Opposition to NCRA Request, at 5-8.

[51] *Id.* at 15-18; GTE Informal Comment, at 2-4.

[52] GTE Informal Comment, at 2-3.

[53] *Id.* at 10.

[54] *Id.*

[55] *Id.* at 4.

[56] *Id.* at 4-5.

[57] *See* Carriers' December 22 filing, at 2.

[58] *See* Carriers' December 20 filing; Carriers' December 22 filing.

[59] CPUC Reply at 107.

[60] *Id.*

petition.[61] In addition, California notes that much of the redacted information was made available for limited disclosure under a protective order currently in effect in California.[62]

19. The facilities-based cellular carriers and their trade association also argue that the CPUC's submission of confidential data violates state law, because the CPUC has issued no order releasing the redacted information to the public.[63] The Resellers respond that this Commission is not authorized to rule on procedural issues involving state law, but is authorized to rule on confidentiality issues, which involve this Commission's own rules.[64] In addition, they cite California regulations in support of the contention that no procedural informality will invalidate the CPUC's action.[65] California argues that disclosure to the FCC does not constitute public disclosure under its state statute.[66]

20. Finally, CCAC and US West argued that the harm that would result from disclosure is recognized in the August 8 California ALJ ruling keeping this data confidential.[67] As NCRA and CRA note, however, that California ALJ ruling did not maintain strict confidentiality, but in fact ordered limited disclosure of much of the Group A data pursuant to the terms of a State protective order now in effect,[68] and that order was never formally contested.[69] Thus, in California, the parties to this Federal proceeding already have access to much of the Group A information.[70] This tends to vitiate the cellular carriers' assertions that even limited disclosure would lead to competitive harm. NCRA asserted that a protective order would be the appropriate vehicle to provide the public with an adequate opportunity to comment on confidential information in the California petition.[71]

21. Commission staff have solicited public input at every stage regarding all aspects of the confidentiality issues. For example, FCC staff conducted a meeting September 30, 1994 on confidentiality issues, and by Public Notice on that date, sought comment on a draft protective order considered at that meeting.[72] Since that Public Notice, the Commission staff have received several *ex parte* communications from parties to the California proceeding, as well as comments on the draft protective order, and a proposed revision of the protective order submitted by several carriers on December 22, 1994.[73] Moreover, parties filed comments regarding the CCAC motion to reject the petition or, alternatively, to reject the redacted information, and the NCRA request that the Commission grant access to the redacted information pursuant to a protective order.[74] We have incorporated the resulting public debate in our decisions here.

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[61] CPUC Reply at 2 & n.1 (noting that the carriers claim that the redacted version does not sustain California's burden of proof).

[62] California notes that none of the cellular carriers have ever challenged the CPUC administrative law judge rulings allowing protected disclosure of all information. It also states its belief that none of the carriers have ever refused to provide upon request to any party to the CPUC proceeding, including a cellular competitor, the information submitted to the CPUC. California Comments in Response to Draft Protective Order, at 3-5.

[63] BACTC, for example, states that Section 583 of the Calif. Pub. Util. Code makes it a criminal misdemeanor for any CPUC officer or employee to divulge information furnished to the CPUC by a public utility or affiliated business, except matters specifically made open to public inspection by statute, unless by order of the commission or a commissioner in the course of a hearing or proceeding. In furnishing an unredacted version to this Commission without issuing such an order, BACTC asserts that CPUC officers and employees violated CPUC's General Order No. 66-C, which makes it clear that confidential information obtained by the CPUC is not open to public inspection. BACTC Opposition at 7-8. *Accord*, AirTouch Opposition at 9 n.17; CCAC Motion at i, 5-6; L.A. Cellular Response to Petition at 3.

CCAC and L.A. Cellular also note that Section 11181(f) of the California Government Code provides that the Attorney General's Office may "divulge evidence of unlawful activity discovered . . . from records or testimony not otherwise privileged or confidential, to the Attorney General or to any prosecuting attorney [responsible] for investigating the unlawful activity discovered, or to any governmental agency responsible for enforcing laws related to the activity discovered." These carriers assert that because the CPUC does not have authority to enforce antitrust violations, the California Attorney General's Office was not authorized to release the information to the CPUC. CCAC Motion at 6-8; L.A. Cellular Response to Petition at 6 n.4.

[64] *See, e.g.*, Reply of the Cellular Resellers Association, Cellular Service, Inc. and ComTech Mobile Telephone Company (collectively, "Resellers"), at 25.

[65] The Resellers cite Sections 454(b) and 1701 of the Calif. Pub. Util. Code, which provide that the CPUC may adopt rules regarding showings required for proposed rate changes and procedures for disposition thereof either with or without a hearing, and that no informality in acquiring evidence shall invalidate a CPUC decision. *Id.*, at n.23. In addition, the Resellers cite CPUC Rule 14.2 of Practice and Procedure, which states that the CPUC may use its rulemaking authority for proceedings to establish rules and guidelines for classes of regulated entities, proceedings on rate making for regulated entities, and proceedings to modify prior CPUC decisions adopted by rulemaking. *Id.*

[66] California Comments in Response to Draft Protective Order, at 5-7.

[67] CCAC Motion at 16-18; US West Opposition to NCRA Request, at 1-4.

[68] *See* CRA Reply at 27 & n.24; NCRA Request for Access to California Petition Pursuant to the Terms of a Protective Order, at 2-3. California's protective order makes available information including the aggregate number of subscribers on each carrier's discount and basic rate plans, and the aggregate number of subscribers divided between retail and wholesale service. *See* Administrative Law Judge's Ruling Granting In Part Motions for Confidential Treatment of Data, I.93-12-007, at 6-7 (July 19 Ruling); Administrative Law Judge's Ruling Granting Motion for Modification of July 19, 1994 Ruling, I.93-12-007, at 7. In addition, California ordered disclosure of the total number of cell site sectors in operation (an aspect of capacity utilization). *See* July 19 Ruling, at 6.

[69] *See ex parte* filing of E. Levine, PR Docket No. 94-105, Jan.17, 1995.

[70] *See* CRA Reply at 27 & n.24.

[71] NCRA Request for Access, at 2-3; NCRA Response to Oppositions to NCRA Request, at 1-4.

[72] Public Notice of Comment Sought on Draft Protective Order, DA 94-1083 (Sept. 30, 1994) (announcing that all interested parties could comment by October 7, 1994 on a draft protective agreement that had been distributed to all parties of record). All parties to the proceeding were given actual notice of the meeting and permitted to participate either in person or by telephone.

[73] *See, e.g.*, Carriers' December 20 filing; Carriers' December 22 filing. Parties filing Comments on the Draft Protective Order included AirTouch, Bay Area Cellular, CCAC, CRA, CTIA, GTE, L.A. Cellular, McCaw, PageNet, California, and US West.

[74] *See* CCAC Motion; Request for Access to California Petition

C. Request for Production of Data

22. Questions arose not only with regard to the California Petition, but also regarding materials filed in support of other parties' pleadings. On October 11, 1994, California filed an emergency motion to compel production of data underlying the affidavits of Dr. Jerry Hausman that were filed in support of the AirTouch and CTIA oppositions to California's petition.[75] California also moved to strike the Hausman affidavit attached to the CTIA Opposition, for failure to include the data underlying Hausman's analyses.[76] California contends it has the right to review and respond to all information reviewed or relied on by commenters opposing its petition, including the underlying data used by Hausman and not provided by AirTouch or CTIA to the Commission or to other commenters.[77] CTIA opposed the CPUC's motion to strike, asserting that it does not have the data requested by CPUC, that it is unable as a trade association to authorize release of data provided directly to Hausman by member carriers, and that the CPUC failed to provide a legal basis for its request. These procedural issues are addressed below, following discussion of the confidentiality issues raised by the California petition.

IV. DISCUSSION

A. Requests Filed by the State of California

23. *Group A and Group B Materials: Confidentiality Analysis.* Parties may request confidential treatment of materials submitted to the Commission by submitting a request for nondisclosure that is consistent with the provisions of the FOIA.[78] California specifically claims that the market share data, the CPUC's computation of the H Index, the information regarding the number of subscribers associated with each carrier's basic rate plan and several discount plans, per-subscriber revenue and expenditure data, and capacity utilization data, all of which the CPUC redacted from its publicly filed petition, are entitled to confidential treatment because they would be exempt from disclosure under Section 0.457(d) of the Commission's Rules, which parallels Exemption 4 of the FOIA. That exemption permits withholding of "trade secrets or commercial or financial information obtained from a person and privileged or confidential."[79]

24. As a threshold matter, we note that we accept California's interpretation of its own state statute: as noted above, California argues that disclosure to the FCC does not constitute public disclosure under its state statute, and accordingly the materials at issue are properly before us.[80] We conclude that much of the information redacted by California, including the Group A and Group B data, consists of materials that may be withheld from disclosure pursuant to Section 0.457(d) of the Commission's Rules, 47 C.F.R. § 0.457(d).. The Commission has in some cases found that market share information is confidential, because disclosure could identify product or geographic market trends ripe for expansion.[81] Disclosure of California's calculation of the H Index might permit competitors to derive market share information. Data that would reveal a carrier's profit margins also "would be likely to enable a competitor to inflict substantial competitive harm."[82] In addition, courts have found that a company's actual costs, break-even calculations, and profits and profit rates are confidential and disclosure is likely to result in competitive harm.[83] Thus, disclosure of the per-subscriber revenues, operating expenses, expenditures for plant, and operating income statistics for cellular carriers could cause competitive injury. Consequently, we conclude that disclosure of

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for State Regulatory Authority Pursuant to the Terms of a Protective Order, filed by the National Cellular Resellers Association, at 3 (Sept. 19, 1994) (NCRA Request for Access). CRA filed comments on the CCAC Motion, and AirTouch, Bay Area Cellular, CCAC, CTIA, L.A. Cellular, McCaw, and US West filed comments on the NCRA request. On October 7, 1994, the Private Radio Bureau issued an Order finding that that the NCRA request was moot and dismissing it on that ground. Order Waiving Certain Pleading Rules and Denying Deferral of Filing Dates, DA No. 94-1117, PR Docket No. 94-105 (Oct. 7, 1994).

[75] Emergency Motion to Compel Production to the California Public Utilities Commission of Information Contained in Opposition to California's Petition to Retain State Regulatory Authority over Intrastate Celular Service Rates (Oct. 11, 1994). Hausman analyzed cellular pricing and competitiveness on the national level, in part on the basis of information provided directly by carriers and in part on the basis of information that he obtained from a consulting firm, Paul Kagan Associates.

[76] Motion by California to Strike Affidavit and Testimony of Jerry A. Hausman Appended to and Discusssed in the Opposition of CTIA (Oct. 11, 1994). The motion to strike followed a sequence of letters between CPUC and CTIA. The most recent of these was a CPUC letter of Oct. 4, 1994, seeking a firm commitment from CTIA by Oct. 7, 1994, to produce the requested information. The CPUC states in its motion to strike that CTIA did not respond to that letter.

[77] In support of its contention, California cites the Federal Rules of Evidence and three decisions: Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977); United States v. Nova Scotia Food Products Corp., 568 F.2d 240 (2d Cir. 1977); Nat'l Black Media Coalition v. FCC, 791 F.2d 1016 (2d Cir. 1986).

[78] *See* 47 C.F.R. § 0.459(d). In addition, as a threshold matter, requests for confidentiality must comply with the Commission's rules setting forth procedural requirements for submitting such requests. *See* 47 C.F.R. §§ 0.457, 0.459, 0.461.

[79] 5 U.S.C. § 552(b)(4); 47 C.F.R. § 0.457(d). The issue of trade secrets is not raised here, because the limited disclosure of information at issue in this Order is authorized by Section 0.457 of the Commission's Rules, 47 C.F.R. § 0.457. *See* CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1151-52 & nn.138-39 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 977 (1988); Chrysler v. Brown, 441 U.S. 281, 301 (1979).

[80] California Comments in Response to Draft Protective Order, at 5-7.

[81] *See, e.g.*, Request of M. Stabbe, *supra*, at 3-4 (Feb. 7, 1992) (disclosure of percentage of subscribers on inside wire maintenance plans would reveal market concentrations and strategic initiatives by wireline carrier and could aid a new competitor by describing market trends or an existing competitor by identifying regions ripe for expansion); *but cf.* Request of R. Berg, at 5 (ordering disclosure of information related to interexchange carrier (IXC) market shares; also noting that relative market positions of various IXCs are already generally known).

[82] Request of R. May, FOIA Control No. 91-130, at 3 (1991) (withholding AT&T cost data associated with its provision of operator services) (*citing* National Parks and Conservation Ass'n v. Kleppe, 547 F.2d 673, 684 (D.C. Cir. 1976) (*National Parks II*)).

[83] See Gulf & Western Indus. v. United States, 615 F.2d 527, 530 (D.C. Cir. 1979).

much of the carrier information submitted by California would be likely to enable a competitor to inflict substantial competitive harm.

25. For these reasons we grant the request for proprietary treatment filed by California to the extent that it seeks confidential treatment for the Group A and Group B materials,[84] except as to several carriers who withdrew their confidentiality claims for the Group A materials.[85] The Group A materials pertaining to those carriers will be disclosed because they have not maintained their claim that disclosure is likely to cause them competitive injury. Because carriers aside from the acceding parties did not withdraw their confidentiality interests, and our preliminary review indicates that these materials involve commercial and financial records not routinely required to be made public by Section 0.459 of the Commission's Rules, the Group A data pertaining to carriers other than the six acceding carriers will be subject to limited disclosure under the Protective Order attached as Appendix A. This will permit counsel for other parties to examine the data for the limited purpose of participating in this proceeding. As many of these materials have been disclosed in the California state investigation subject to protective order, and six carriers have acceded to their full public disclosure in this proceeding, US West and other non-acceding parties will bear a heavy burden of persuasion if they seek to overturn this determination.

26. In regard to the Group B data, as described below, we grant the California request but, similarly, subject the data to limited disclosure under the Protective Order attached as Appendix A. In so doing, we conclude that Section 0.457(d) of the Commission's Rules, implementing 5 U.S.C. 552(b)(4) ("Exemption 4" of the Freedom of Information Act (FOIA)), protects from unqualified disclosure the redacted materials on pages 29-34, 40-41, 51-54 and in Appendices E, F, J, and M of California's Petition (Group B data).[86]

27. Our finding that substantial competitive harm is probable does not automatically lead to withholding of desired information, because the Commission's Rules and the FOIA provisions they reflect are exemptions from required disclosure; they are not categorical bars to disclosure. Even when information falls within the scope of a FOIA exemption, the government retains discretion to order release based on public interest grounds.[87] In determining whether the public interest in disclosure is sufficiently compelling to outweigh a legitimate interest in the privacy of proprietary business data, the Commission has adhered to a policy whereby it:

> will not authorize the disclosure of confidential financial information on the mere chance that it might be helpful, but insists upon a showing that the information is a necessary link in a chain of evidence that will resolve a public interest issue.[88]

Alternatively, even when information is critical to resolution of a public interest issue, the competitive threat posed by widespread disclosure under the FOIA[89] may outweigh the public benefit in disclosure.[90] In such instances, disclosure under a protective order may serve the dual purpose of protecting competitively valuable information while still permitting limited disclosure for a specific public purpose.[91] The public interest in disclosure derives from the interest of parties to a proceeding in receiving adequate notice of potential bases for the agency decision, and an opportunity to comment on those grounds.[92] The courts have upheld agency nondisclosure of information where the material is not of decisional significance or where its omission from the record does not deprive parties of notice and a meaningful opportunity to comment.

28. The Commission and staff have applied these principles in analogous cases. In AT&T, FOIA Control No. 99-190, the Common Carrier Bureau distinguished between material of "critical significance" and data providing a " factual context" for the consideration of broad policy issues. The Bureau stated that resolving a confidentiality request entails determining not only the extent to which data might be helpful, but further whether its value outweighs the prospect of competitive harm likely to flow from release.[93] We considered the parties' comments and submissions, and we independently balanced the public interest in revealing the information and the private harm that could result from disclosure.[94] We note that the Group

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[84] Again, Group C is our designation for the the per-subscriber financial information and subscriber growth percentages for 1989-93, found in Appendix H to the California petition.

[85] *See* Carriers' December 20 filing; Carriers' December 22 filing.

[86] These materials, listed *supra* Sec. II(A), consist of market share statistics, California's computed H Index for each market, capacity utilization statistics, the number of subscribers on each carrier's specific discount and basic rate plans, the number of subscribers associated with all discount plans of a given carrier, annualized per-subscriber data, and annualized subscriber growth statistics.

[87] *Chrysler v. Brown*, 441 U.S. at 290-94.

[88] *Classical Radio for Connecticut, Inc.*, 69 FCC 2d 1517, 1520 n.4 (1978).

[89] Under the FOIA, disclosure to one party generally compels disclosure to all parties. United States Dep't of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 771 (1989).

[90] *See, e.g.*, Commission Requirements for Cost Support Materials to be Filed with Open Network Architecture Access Tariffs, 7 FCC Rcd 1526, 1533 (Com. Car. Bur. 1992) (*SCIS Disclosure Order*), *aff'd*, Order, 9 FCC Rcd 180 (1993); Memorandum Opinion and Order, In the Matter of Motorola Satellite Communications, Inc. Request for Pioneer's Preference to Establish a Low-Earth Orbit Satellite System in the 1610-1626.5 MHz Band, ET Docket No. 92-28 PP-32, FOIA Control Nos. 92-83, 92-88, 92-86, 7 FCC Rcd 5062, 5062 & n.7 (1992); *see also* Letter from G. A. Weiss, Acting Chief, Enf. Div., Common Carrier Bureau, FCC, to F. J. Berry, AT&T, 9 FCC Rcd 2610, 2613 (Enf. Div., Com. Car. Bur. 1994) (McCaw/AT&T Protective Order attached), *amended*, Letter from T. D. Wyatt, Chief, Formal Compl. & Inves. Branch, Enf. Div., Common Carrier Bureau, FCC, to Counsel for Parties of Record (dated May 20, 1994); In the Matter of American Telephone and Telegraph Co. and Craig O. McCaw, FCC No. 94-238, 9 FCC Rcd 5836, 5925 (denying Bell Companies' motion to waive the McCaw/AT&T Protective Order).

[91] *See id.*

[92] *See, e.g.*, Abbott Laboratories v. Young, 691 F. Supp. 462, 466-67 (D.D.C. 1988), remanded on other grounds, 920 F. 2d 984 (D.C. Cir. 1990), cert. denied *sub nom.* Abbott Laboratories v. Kessler, 112 S. Ct. 76, 116 L. Ed.2d 49 (1991).

[93] AT&T, FOIA Control No. 88-190 (Com. Car. Bur. Nov. 23, 1988). *See also* Butler, 6 FCC Rcd 5414, 5418 (1991).

[94] 47 C.F.R. § 0.461(f)(4); *see also, e.g.*, AT&T, FOIA Control No. 88-190 (Com. Car. Bur. Nov. 23, 1988).

A information are likely to be very useful to the Commission's analysis on the merits, in an indirect fashion. These data elements can be used as evidence that costs have fallen since 1989, and they explain the price movements. The data regarding expenditures for plant can be used to develop weights to average rate of return over the whole state. As California's burden includes proving arguments regarding rates of return and rate levels,[95] the Group A data is likely to be relevant to proving California's case on the merits. Based on this analysis, we order only limited disclosure of the Group A data.[96]

29. Following the precedent noted above, we now consider the extent to which the Group B information is reasonably likely to inform the Commission's ultimate decisions on the merits, and find that this data is likely to be relevant to proving California's case on the merits. California states in its petition that the market share information is offered to prove California's contention that relatively stable shares of the wholesale cellular market demonstrate limited competition, that resellers' collective share of the retail market for cellular services is dwindling, and that cellular licensees' share of the retail market is increasing.[97] The CPUC provides its calculation of the H Index for four markets in support of its argument that the marketplace is becoming less competitive.[98] The CPUC provides capacity utilization data to support its assertion that high prices for cellular service are not due solely to spectrum scarcity.[99]

30. We find, without suggesting any view of the merits, that these submissions could easily constitute logical and relevant foundations for the arguments they are offered to prove, and we find that those arguments are relevant to the demonstration California is required to make, regardless of whether they are ultimately persuasive. Accordingly, the submissions could well constitute a link in the chain of evidence leading to the Commission's ultimate decision on the merits. The Group B data is sufficiently relevant to disposition of California's petition that it cannot be excluded from consideration of the issues on the merits. Such exclusion would in effect deny California the opportunity to make the demonstration, required by Congress and detailed in Section 20.13 of the Commission's Rules, by submitting relevant information. It is therefore desirable to afford the public an opportunity to comment on this data. Unlimited disclosure is not appropriate, however, due to the potential for competitive injury. Accordingly, we adopt the Protective Order attached as Appendix A for use in the California proceeding, and we order limited disclosure, pursuant to the Protective Order, of the Group B data.

31. *Group C Materials.* The materials in Group C present different considerations: one data element is clearly not material to a Commission decision, and the other has not been authenticated as required by Section 20.13 of the Commission's Rules, 47 C.F.R. § 20.13.

32. The data in Appendix J of the California Petition, regarding the numbers of subscribers on each of the carriers' several discount rate plans, is not essential to California's arguments, while it poses substantial potential for competitive harm to the carriers. The carriers largely express concern about disclosure of the number of customers on each carrier's several specific discount plans,[100] and these statistics are neither included nor referenced in California's Petition. The carriers persuasively argue that even limited disclosure of these data would permit their competitors to target and attract groups of customers with great specificity by mirroring the existing discount plans. Thus, the Appendix J data will be disclosed only in part. Under the Protective Order, counsel may view Appendix J data including (1) the total number of customers (wholesale and retail) per carrier per MSA; (2) customer growth rates per MSA (percentages that can be derived with reasonable precision from customer totals); and (3) the number of customers on each carrier's basic plan per MSA. We will, however, delete from information on file with this Commission the number of customers subscribing to each carrier's specific discount plans. That information will not be disclosed in any manner in this proceeding, and it will be returned to the CPUC.

33. We have also included under Group C data the several textual passages in the California Petition that we refer to as the Attorney General (AG) Excerpts. These consist of references, on pages 42, 45, and 75, to materials that California asserts were acquired in the course of an ongoing antitrust investigation and submitted to the CPUC by the state Attorney General's office, on condition that the materials would not be disclosed publicly without the Attorney General's consent.[101] The AG excerpts are based on internal cellular company documents that do not appear in full in the confidential version of the California petition.[102] Section 20.13(2)(vi) of the Commission's Rules, 47 C.F.R. § 20.13(2)(vi), expressly sets forth a strict standard for authentication, requiring support in the form of an affidavit by a person with personal knowledge, for allegations relevant to anti-competitive or discriminatory practices or behavior. Such allegations are at issue here; California is attempting to provide evidence of anti-competitive or discriminatory practices or behavior by cellular licensees. Thus, our rules require states to submit the appropriate affidavits, at a minimum,[103] before such contentions are even entertained. Because these materials were not filed with the necessary supporting affidavits, they will not be considered by the Commission and therefore we do not require disclosure of those Excerpts pursuant to the attached protective order. For this reason, and because we are permitting limited access to some of the Group A materials, we grant the CCAC Motion in part and deny it in part. If California wishes, it may re-file the Excerpts, accompanied by supporting materials that comply with Section 20.13 of the Commission's Rules,[104] and a request for confidential treatment, no later than January 30, 1995.

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[95] *See* 47 C.F.R. § 20.13.

[96] Furthermore, we permit unlimited disclosure of this data as related to the six acceding carriers.

[97] California Petition at 29-32.

[98] *Id.* at 33-34.

[99] *Id.* at 51-53.

[100] Carriers' December 20 filing; Carriers' December 22 filing.

[101] *See* Request for Proprietary Treatment of Documents used in Support of Petition to Retain Regulatory Authority over Intrastate Cellular Service Rates, P.R. File No. SP-3, at 2-3 (filed Aug. 9, 1988) (*California Confidentiality Request);* September 14 Submission, at 2.

[102] The confidential submission consists solely of the exerpts set forth in the text of the unredacted petition.

[103] A description or photocopy of at least the relevant portion of the source materials, *e.g.*, although not required, would provide additional indicia of context and origin of the excerpts.

[104] 47 C.F.R. § 20.13.

34. For purposes of PR Docket No. 94-105 and the Protective Order attached as Appendix A, therefore, Confidential Information shall consist of:

(GROUP B)

a. Market share data as contained in pages 29 to 34 of the unredacted Petition of the People of the State of California and the Public Utilities Commission of the State of California To Retain State Regulatory Authority Over Intrastate Cellular Service Rates (Petition) and Appendix E thereto. The data on page 29 is disaggregated by carrier, and on pages 30-34, aggregated by market. Some data on page 30 is further aggregated by combining data in two markets. The data in Appendix E is aggregated as to resellers by market, and disaggregated for cellular carriers.

(GPOUP B)

b. Capacity utilization figures as contained in pages 50-53 of the unredacted Petition, and in Appendix M. This data is aggregated for the Los Angeles market on page 51 and Appendix M-1, and disaggregated as to specific carriers on pages 52-53 of the Petition and Pages M-1 to M-3 of Appendix M.

(GROUP B)

c. Disaggregated, carrier-specific data regarding the number of customers per year, per rate plan, both wholesale and retail, as contained in Appendix J to the Petition, with the exception of the numbers of customers on each carrier's specific discount plans, which shall not be disclosed.

(GROUP A, BUT NOT PERTAINING TO THE SIX ACCEDING CARRIERS)

d. Only for carriers other than those that we refer to as the six acceding carriers, annualized per-subscriber financial data, including revenues, operating expenses, expenditures for plant, operating income, and subscriber growth percentages for 1989-93, found in Appendix H to the Petition.

B. California Motion to Compel Production of Data

35. On October 11, 1994, California filed an emergency motion to compel production of data underlying the affidavits of Dr. Jerry Hausman that were filed in support of the CTIA and AirTouch Oppositions to the California petition.[105] California also moved to strike the Hausman affidavit attached to the CTIA Opposition, for failure to include the data underlying Hausman's analysis.[106] California contends that it has the right to review and respond to all information reviewed or relied on by commenters opposing its petition, including the underlying data used by Hausman and not provided by AirTouch or CTIA to the Commission or to other commenters.

36. In opposition to the CPUC's motion to compel production, CTIA asserts that it does not have the data requested by CPUC, that it is unable as a trade association to authorize release of data provided directly to Hausman by member carriers, and that the CPUC failed to provide a legal basis for its request.[107] CTIA argues that it does not have the information provided to Hausman by cellular carriers or Paul Kagan Associates.[108] CTIA also asserts that PR Docket No. 94-105 is neither an adjudicatory hearing nor a rulemaking required by law to be made on the record after opportunity for hearing, and contends that, absent a FOIA determination, compelling production of these records would convert the proceeding into a hearing that would require production of the documents as a precondition to designation for hearing.[109] In addition, CTIA states the Commission has previously ruled against discovery of sensitive documents prior to designation, or in the investigatory stage of a proceeding.[110]

37. Limited discovery is permitted by the Commission's Rules not only in situations involving proceedings designated for hearing, but also in certain specific contexts such as proceedings to prescribe a rate of return.[111] No such proceedings are involved here, however, and the California proceeding has neither been designated for hearing nor subjected to discovery procedures, nor does Section 20.13 of our Rules provide for discovery in these proceedings. The discretion accorded regulatory agencies in ordering their procedures, when specific matters are not expressly subjected to the requirements of formal rulemaking or adjudicative process by statutory requirement, is well established.[112] The cases that California cites do not support its argument, because they involve situations in which the Commission or other regulatory authority had actual custody of the records in dispute, while in this instance the Commission has not received Hausman's supporting data from any source. Nor are the Federal Rules of Evidence, which govern presentation of testimony in trial proceedings, at issue in an administrative context that, as noted, has not been designated for formal adjudicative hearing. We have granted parties every opportunity for formal and informal input, but permitting motion practice and discovery at this late stage would burden the Commission to the extent that we could not meet our statutory deadline.[113] For all these reasons, we dismiss California's motions, and we similarly will dismiss any future discovery requests in these state petition proceedings as improperly filed without sanction in the Commission's Rules.

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105 Emergency Motion to Compel Production, *supra* note 75.

106 Motion to Strike, *supra* note 76.

107 Opposition of CTIA to the Motion by California to Strike Affidavit and Testimony of Jerry A. Hausman (Oct. 17, 1994).

108 *Id.* at 2.

109 *Id.*

110 *Id.*

111 *See* 47 C.F.R. §§ 0.311, 65.1, 65.103.

112 *See, e.g.,* Western Union v. F.C.C., 804 F.2d 1280, 1292 (D.C. Cir. 1986) (the Commission has broad discretion in choosing the procedures the Commission will use to perform its statutory duties); Bell Telephone of Pennsylvania v. F.C.C., 503 F.2d 1250 (3rd Cir.), *cert. denied,* 422 U.S. 1026 (1974) (the Commission has broad discretion to use differing procedures in differing contexts as required for the proper dispatch of business).

113 CTIA is inaccurate in its assertion that compelling production of the Hausman supporting data would transform this proceeding into a formal adjudication. Although our rules provide that discovery rules may be followed after a proceeding is designated for hearing, they do not state that application of discovery rules, in part or in full, will turn a proceeding into a formal adjudication. *See* 47 C.F.R. §§ 1.311, 1.311(a).

38. At the same time, the absence of these supporting materials from the record substantially discounts the weight to be accorded Hausman's analysis, which is premised in any event on data from other states. If AirTouch and CTIA wish the Commission to consider Hausman's analysis in its substantive review of California's petition, those carriers must provide the Commission with the underlying data used to conduct Hausman's analysis, accompanied by a request for confidential treatment if appropriate pursuant to Sections 0.457, 0.549 and 0.461 of the Commission's Rules, 47 C.F.R. §§ 0.457, 0.549 and 0.461, by January 30, 1995. If the carriers choose this approach, and if the Commission determines the request for confidential treatment is justified, then California and other parties in Docket No. 94-105 will be afforded access to that data on the same schedule that is established in para. 42 for other supplemental filings, and the terms of the protective order in Appendix A.

C. Connecticut Requests; Offers to Supplement Petitions in Hawaii and New York Proceedings

39. As noted *supra* in paragraphs 5 and 9, Connecticut has re-submitted confidential materials, apparently in compliance with the Commission's Rules.[114] As this filing was submitted a scant four business days prior to release of this Order, we will examine it on the same schedule as set forth in paragraphs 41 and 42 in regard to supplemental confidential submissions from New York and Hawaii.

40. The rate of return data and analyses that Springwich and BAMMC submitted to the FCC under seal[115] are already subject to a protective order in the DPUC investigation, and the carriers simply ask that the existing order be adopted in the instant proceeding. The carriers' requests comply with the Commission's procedural rules, and our review satisfies us that these materials satisfy the exemptive criteria of Section 0.457(d) of the Commission's Rules. The parties have agreed to protected disclosure of carrier-furnished data elements in the Connecticut proceeding, and we see no reason to depart from protective procedures adopted by Connecticut and accepted by the carriers. Reasons of comity and simplicity, as well as administrative convenience, persuade us to order limited disclosure of these materials pursuant to the Connecticut protective order, attached as Appendix B. Comments and replies regarding these materials shall be filed according to the schedule set forth in para. 42.

41. If New York and Hawaii wish, they may submit the supplemental materials to which they alluded in their petitions, accompanied by a request for confidential treatment, in accordance with Sections 0.457, 0.459 and 0.461 of the Rules, no later than January 30, 1995. The materials referenced by these states appear to consist of those types of materials that we have determined in this Order may be disclosed pursuant to protective order. If such a request from either state for confidential treatment is filed, the Bureau will promptly determine whether the request is justified regarding some or all of the materials, and will expeditiously announce that determination in a Public Notice specifying the scope of materials to be covered by the Protective Order attached as Appendix A.[116] This protective order was carefully crafted based on our precedent and with input from parties after notice of the provisions to all parties in the PR Docket No. 94-105 proceeding, whose interests reflect those of parties in the other state proceedings, and the terms of this protective order will be adopted to govern treatment of confidential materials submitted by the other states.[117]

42. Parties in PR Docket Nos. 94-105, 94-103, 94-106, and 94-108 who elect to inspect unredacted materials submitted by the States of Connecticut, Hawaii or New York shall execute and comply with the protective order attached as Appendix A (Appendix B for Connecticut), and with the provisions of this Order, and shall file comments on those pleadings no later than February 9, 1995, and the States of California, Connecticut, Hawaii and New York shall file their reply comments no later than February 15, 1995.

V. Ordering Clauses

California

43. Accordingly, pursuant to 0.459(d) of the Commission's Rules, IT IS ORDERED that the request for proprietary treatment filed by the Public Utilities Commission for the State of California IS GRANTED IN PARTand IS DENIED IN PART as described in paragraphs 25-34.

44. IT IS FURTHER ORDERED that the Public Utilities Commission for the State of California SHALL FILE no later than January 27, 1995, for inclusion in the record of PR Docket No. 94-105, separate redacted (public) and unredacted (sealed) versions of its Petition and related Appendices. The newly filed public version of the Petition and Appendices shall include all material that we refer to as Group A data, excepting Group A data that pertains to carriers other than AirTouch, BellSouth, L.A. Cellular, GTE, and McCaw. The newly filed sealed version of the Petition and Appendices shall include all material that we refer to as Group A data, pertaining to all carriers, as well as all material that we refer to as Group B data. The materials that we refer to as Group C materials, however, shall be redacted from both the newly filed public version and the newly filed sealed version of the Petition and Appendices.

45. Parties to PR Docket No. 94-105 who seek to inspect the newly filed unredacted version of the California petition and related Appendices may obtain those documents by filing an executed copy of the Protective Order attached to this Order as Appendix A with the Secretary of this Commission. For this purpose, Confidential Information shall consist of those materials described in paragraph 34.

46. IT IS FURTHER ORDERED that, if the Public Utilities Commission for the State of California chooses to re-file the so-called AG Excerpts in accordance with Section 20.13 of the Commission's Rules, as described above

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[114] *See* Third Connecticut Request; 47 C.F.R. §§ 0.459(a), (b).

[115] *See* Request for Non-Disclosure of Confidential and Proprietary Financial Information, filed in PR Docket No. 94-106 by BAMMC on November 8, 1994; Request for Non-Disclosure of Confidential and Proprietary Financial Information, filed in PR Docket No. 94-106 by Springwich on September 19, 1994.

[116] We expect to complete that assessment in time to adhere to the comment and reply dates established in para. 42, and consequently will regard requests for extension of time from Hawaii or New York with disfavor.

[117] As noted *supra*, we held a public meeting on Sept. 30, 1994, with notice to all parties and participation in person and by telephone by most parties. *See also* Public Notice, DA No. 94-1083, *supra* note 72.

in paragraph 33, it SHALL FILE SUCH REVISED SUBMISSIONS, accompanied by a request for confidential treatment, no later than January 30, 1995.

47. IT IS FURTHER ORDERED that parties in PR Docket No. 94-105 who elect to inspect confidential Group A or Group B materials submitted by the California Public Utilities Commission SHALL FILE comments on those materials no later than February 9, 1995, and that reply comments SHALL BE FILED no later than February 15, 1995.

48. IT IS FURTHER ORDERED that, if CTIA or AirTouch chooses to file information underlying the affidavit of economist Jerry Hausman, one or both parties SHALL FILE SUCH SUBMISSIONS, accompanied by any request for confidential treatment, no later than January 30, 1995.

49. IT IS FURTHER ORDERED that parties in PR Docket No. 94-105 who elect to inspect any information, submitted by CTIA and/or AirTouch, that supported the affidavit of economist Jerry Hausman, SHALL FILE comments on those materials no later than February 9, 1995, and that reply comments SHALL BE FILED no later than February 15, 1995.

50. IT IS FURTHER ORDERED, pursuant to delegated authority, that the Emergency Motion to Compel Production to the California Public Utilities Commission of Information Contained in Oppositions to California's Petition to Retain State Regulatory Authority over Intrastate Cellular Services Rates, filed by the California Public Utilities Commission and the People of the State of California and the Motion by California to Strike Affidavit and Testimony of Jerry A. Hausman Appended to and Discussed in the Opposition of CTIA ARE DENIED AS MOOT AS INDICATED HEREIN, and the Motion to Reject Petition or, Alternatively, Reject Redacted Information, filed by the Cellular Carriers Association of California, IS GRANTED IN PART AND DENIED IN PART.

Hawaii and New York

51. IT IS FURTHER ORDERED that the States of Hawaii and New York MAY SUBMIT SUPPLEMENTAL MATERIALS, accompanied by a request for confidential treatment under Section 0.459 of the Rules, 47 C.F.R. § 0.459, no later than January 30, 1995.

52. IT IS FURTHER ORDERED that parties in PR Docket Nos. 94-103, 94-106, and 94-108 who elect to inspect unredacted materials submitted by the States of Connecticut, Hawaii or New York SHALL FILE comments on those pleadings no later than February 9, 1995, and that reply comments SHALL BE FILED no later than February 15, 1995.

53. This Order is issued under delegated authority and, in order to meet the statutory deadline set forth in Section 332(c)(3)(B) of the Communications Act, 47 U.S.C. 332(c)(3)(B), is effective upon adoption. California may, within 5 working days, file an application for review by the Commission of the partial denial of California's request for confidentiality. 47 C.F.R. § 0.459(g).

54. This Order will be served upon release by electronic facsimile upon the states of California, Connecticut, Hawaii, and New York, and upon CTIA and AirTouch, to permit them to file or re-submit supplemental materials and an accompanying request for confidential treatment, in accordance with the time frames established herein.

FEDERAL COMMUNICATIONS COMMISSION

Regina M. Keeney
Chief, Wireless Telecommunications Bureau

Attachments

APPENDIX A

PROTECTIVE ORDER AND DECLARATION

1. For purposes of this Order, "Confidential Information" shall mean and include trade secrets and commercial or financial information which is privileged or confidential within the meaning of Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552 (b)(4), as well as [any additional types of confidential information].

2. Confidential Information submitted herein by the [State -- full name] ([State -- short form name]) shall be segregated from all material filed and deemed non-confidential as generally set forth in the pleadings filed publicly by [State] on [date], and subsequent revisions filed on [date], in PR Docket No. 94-[ ] (Proceeding). Confidential Information, thus segregated, shall consist of materials specified by the Commission in its Order, DA 94-111 (Jan. 25, 1995) or any subsequent actions in these proceedings.

3. Confidential Information may be disclosed, directly or indirectly, only to:

a. Counsel for the Parties to this Proceeding (Parties) and their associated attorneys, paralegals, clerical staff and other employees, to the extent reasonably necessary to render professional services in this proceeding, provided that such persons are not representing or advising or otherwise assisting providers of [State] commercial mobile radio services in devising marketing plans to compete against [State] carriers that are Parties to this Proceeding;

b. Specified persons, including employees of the Parties, requested by counsel to furnish technical or other expert advice or service, or otherwise engaged to prepare material for the express purpose of formulating filings in

connection with PR Docket No. 94-[ ], excluding those persons who are directly or indirectly involved in or have direct or indirect supervisory responsibilities over the development of marketing plans for [State] commercial mobile radio services providers to compete against [State] cellular carriers that are parties to this Proceeding; or

c. Any person designated by the Commission in the public interest, upon such terms as the Commission may deem proper.

4. Counsel may request that the Commission provide one copy of Confidential Information (for which counsel must, as a prerequisite, acknowledge receipt pursuant to this Order), and counsel may thereafter make no more than two additional copies but only to the extent required and solely for the preparation and use in this proceeding, and provided further, that all copies of the Confidential Information shall remain in the care and control of counsel at all times and shall not pass to any other persons. Following the filing of Further Comments on ____, 1995, counsel shall retain custody of the Confidential Information until such time as it is necessary to prepare additional filings in connection with PR Docket No. 94-[ ] in the discretion of counsel. If such additional filings are necessary, counsel shall retain custody of the Confidential Information following submission of such additional filings. Counsel shall return to the Commission within forty-eight hours after the final resolution of PR Docket No. 94-[ ] all Confidential Information originally provided by the Commission as well as all copies made, and shall certify that no material whatsoever derived from such Confidential Information has been retained by any person having access thereto, except that counsel may retain copies of pleadings submitted on behalf of clients.

5. Confidential Information shall not be used by any person granted access under this Order for any purpose other than for use in this proceeding (including any subsequent administrative or judicial review), and shall not be used for competitive business purposes or otherwise disclosed by such persons to any other person except in accordance with this Order. This shall not preclude the use of any material or information that is in the public domain or has been developed independently by any other person who has not had access to the Confidential Information nor otherwise learned of its contents.

6. a. Before obtaining access to Confidential Information, counsel must apply for access to such materials by executing the attached Declaration.

b. Counsel may disclose Confidential Information to persons to whom disclosure is permitted under the terms of paragraph 3 of this Order only after advising such persons of the terms and obligations of this Order and obtaining such person's written consent to be bound by its terms, except that written consent need not be obtained from paralegals and clerical staff.

c. Counsel shall provide to the FCC and, in the absence of a need for confidentiality, to California and/or the other Parties, the name and affiliation of each person other than counsel to whom disclosure is made or to whom actual physical control over the documents is provided, by the deadline prescribed by the Commission for filing comments on the Confidential Information, or within three (3) business days after the disclosure if such disclosure occurs after the deadline for filing such comments. To the extent that any name is not disclosed to [State], that fact shall be disclosed to the FCC and [State].

7. Parties may, in any pleadings that they file in this proceeding, reference the Confidential Information, but only if they comply with the following procedures:

a. Any portions of the pleadings that contain or disclose Confidential Information must be physically segregated from the remainder of the pleading;

b. The portions containing or disclosing Confidential Information must be covered by a separate letter referencing this Protective Order; and

c. Each page of any Party's filing that contains or discloses Confidential Information subject to this Order must be clearly marked: "Confidential information included pursuant to Protective Order, PR Docket No. 94-[ ]."

d. The confidential portion(s) of the pleading shall be served upon the Secretary of the Commission and [State], and and one and only one copy shall be served upon those individuals who have signed the attached Declaration, and such confidential portions shall be served under seal, and shall not be placed in the Commission's Public File, unless the Commission directs otherwise (with notice to the Party that filed the pleading and an opportunity to comment on such proposed disclosure). The Parties shall provide courtesy copies to the Legal Advisor to the Wireless Telecommunications Bureau Chief and to the Chief, Policy Division, Wireless Telecommunications Bureau, who will ensure that copies are distributed to the appropriate Commission personnel.

8. Disclosure of materials described herein shall not be deemed a waiver by [State] or any other Party in any other proceeding, judicial or otherwise, of any privilege or entitlement to confidential treatment of such Confidential Information. Inspecting parties, by viewing said documents: (a) agree not to assert any such waiver; (b) agree not to use information derived from any confidential materials to seek disclosure in any other proceedings; and (c) agree that accidental disclosure of privileged information shall not be deemed a waiver of the privilege.

9. The entry of this Order is without prejudice to the rights of [State] to apply for additional or different protection where it is deemed necessary or to the rights of the Parties to request further or renewed disclosure of Confidential Information. Moreover, it in no way precludes the Commission from disclosing any information where the public interest so requires.

DECLARATION

PR DOCKET [94-]

I, _____, hereby declare under penalty of perjury that I have read the Protective Order that has been entered by the Wireless Telecommunications Bureau in Federal Communications Commission proceeding PR Docket No. 94-[ ], and that I agree that I will be bound by its terms pertaining to the confidentiality of Confidential Information and that I am not involved in devising marketing plans for any of the Parties.

_____

APPENDIX B

FEDERAL COMMUNICATIONS COMMISSION

PR DOCKET NO. 94-106

PROTECTIVE ORDER (CONNECTICUT)

WHEREAS Springwich Cellular Limited Partnership ("Springwich") and Metro Mobile CTS of Fairfield County, Inc., Metro Mobile CTS of Hartford, Inc., Metro Mobile CTS of New Haven, Inc., Metro Mobile CTS of New London, Inc., Metro Mobile CTS of Windham, Inc. (collectively "Metro Mobile"), and Litchfield County Cellular, Inc. ("Litchfield") are providing certain information, namely interrogatory responses and late filed exhibits, which would in the opinion of Springwich, Metro Mobile, and Litchfield result in the disclosure of confidential and proprietary information, and which information Springwich, Metro Mobile, and Litchfield contend constitutes trade secrets.

NOW THEREFORE, IT IS HEREBY ORDERED that the following procedure be adopted for the protection of said interrogatory responses and late filed exhibits by or from Springwich, Metro Mobile, and Litchfield:

1. Any and all information provided by Springwich, whether in documentary form or otherwise, identified as follows: Attachment A to TE-3, Attachment A to TE-5, and Attachment A to TE-6, and any and all information requested on or after the hearings commenced in this proceeding on May 12, 1994, and which the Department has or may in the future require Springwich to provide on a protected basis, including but not limited to Springwich's responses to late-filed requests number 2, 3, 4, 5, 7 and 9 (portions), shall be governed by the terms of this Order (hereafter, together with the information provided hereunder by Metro Mobile and Litchfield, the "Confidential Information"). This Order is applicable to all such "Confidential Information, whether in the form of documents, data, testimony, studies, or otherwise, and applies also to any material in the form of documents, data, testimony, studies, or otherwise which may be created for purposes of this proceeding by Recipients, as defined below, based upon or by reference to the Confidential Information.

2. Any and all information provided by Metro Mobile, whether in documentary form or otherwise, identified as follows: TE-3 and TE-6, and any and all information requested on or after the hearings commenced in this proceeding on May 12, 1994 and which the Department has or may in the future require Metro Mobile to provide on a protected basis, shall be governed by the terms of this Order. This Order is applicable to all such Confidential Information, whether in the form of documents, data, testimony, studies, or

otherwise, and applies also to any material in the form of documents, data, testimony, studies, or otherwise which may be created for purposes of this proceeding by Recipients, as defined below, based upon or by reference to the Confidential Information.

3. Any and all information provided by Litchfield, whether in documentary form or otherwise, identified as follows: TE-3, and TE-6 and any and all information requested on or after the hearings commenced in this proceeding on May 12, 1994 and which the Department has or may in the future require Litchfield to provide on a protected basis, shall be governed by the terms of this Order. This Order is applicable to all such Confidential Information, whether in the form of documents, data, testimony, studies, or otherwise and applies also to any material in the form of documents, data, testimony, studies, or otherwise which may be created for purposes of this proceeding by Recipients, as defined below, based upon or by reference to the Confidential Information.

4. All Confidential Information made available pursuant to this Order shall be given solely to the Federal Communications Commission ("Commission") and any member of its staff. Such Confidential Information shall also be provided, subject to the terms of this Order, to the following Recipients: the Office of Consumer Counsel, and any member of its staff; the Attorney General, and any member of his staff; Jean L. Kiddo and Shelley L. Spencer (as outside counsel to Springwich) of Swidler & Berlin, Chtd; Robert P. Knickerbocker (as outside counsel to Metro Mobile) of Day, Berry & Howard; Thomas Ryan (as outside counsel to Escotel Cellular, Inc., The Phone Extension, Inc., and Esco PCN Telecommunications, Inc.); Paul E. Knag (as outside counsel to the Connecticut Resellers Coalition) of Cummings and Lockwood; Charles W. King (as outside expert witness for the Connecticut Resellers Coalition) of Snavely & King; and Jerry A. Hausman (as outside expert witness for Metro Mobile and, for purposes of this Order, as outside expert for Springwich) of the Massachusetts Institute of Technology; and to such individuals at their respective firms or other independent outside experts retained by any admitted party or intervenor herein as may also execute a copy of this Order and submit such executed copy to the Department, with a copy to counsel for Springwich, Metro Mobile and to Litchfield. Confidential Information may not be provided or disclosed in any manner by the Commission or any Recipient to any individual with operational responsibilities at any party or intervenor or to anyone else whatsoever except those designated as permissible Recipients hereunder.

5. Confidential Information will be plainly marked as such and delivered in sealed envelopes to William F. Caton, Secretary, Federal Communications Commission, for filing under seal, and to the other recipients. Confidential Information so provided shall be

maintained by the Commission and Recipients in sealed envelopes or containers and a statement in the following form placed on such envelope or container:

THIS ENVELOPE IS NOT TO BE OPENED
NOR THE CONTENTS THEREOF TO BE
DISPLAYED OR REVEALED EXCEPT PURSUANT
TO THE PROTECTIVE ORDER ISSUED IN
PR DOCKET NO. 94-106.

6. The Commission and all Recipients shall be bound by the terms of this Order.

7. In the event the Confidential Information is to be used in any manner in this proceeding before the Commission, such proceeding or hearing shall not be held before, nor any record of it made available to, any party, intervenor, or any other person or entity other than under seal issued hereunder. Present at such proceeding or hearing shall be the Recipients, as well as counsel and representatives of Springwich where Confidential Information provided by Springwich is used, counsel and representatives of Metro Mobile where Confidential Information provided by Metro Mobile is used, and by counsel and representatives of Litchfield where Confidential Information provided by Litchfield is used; provided, however, that outside counsel of Springwich, Metro Mobile, and Litchfield may participate in all such proceedings or hearings. No record shall be disclosed or communication made at any time to any person or entity other than as specified in this Order, except by Commission decision explicitly providing affected parties the opportunity for prior judicial review.

8. Any reference to Confidential Information in briefs in this proceeding shall be by separate supplemental or unredacted briefs, which supplemental or unredacted briefs shall be plainly marked to identify the contents as Confidential Information, shall be separately filed with the Commission in plainly marked sealed envelopes, shall be distributed only to individuals who are permitted access to the Confidential Information pursuant to this Order, and will be retained by the Commission under seal.

9. No copies shall be made of the Confidential Information other than for the Recipients unless expressly ordered by the Commission.

10. Nothing herein shall be construed as a final determination that any of the Confidential Information will be admissible as substantive evidence in this proceeding or at any hearing. Moreover, nothing herein shall be considered a waiver of either party's right to assert at a later date that the material is or is not proprietary or is privileged. A party seeking to change the terms of this Order shall by Motion give the other parties three (3) days prior written notice. No information protected by this Order shall be made public until the Commission rules on any request to change the terms of the Order and such ruling becomes final.

11. Confidential Information otherwise properly discovered, even though also subject to the terms of this Order, shall not be considered protected by this Order.

12. No Recipient shall use or disclose the Confidential Information for purposes of business or competition, or for any other purpose, other than the purpose of preparation for and conduct of Commission proceedings, and then solely as contemplated herein, and shall in good faith take all reasonable precautions to keep the Confidential Information secure and in accordance with the purposes and intent of this Order. To the extent that the Commission determines to use any Confidential Information in findings of fact or otherwise in its decision in this proceeding, it shall do so in an addendum to its decision, and shall maintain such addendum subject to the terms of this Order.

13. Confidential Information made part of the record in this proceeding shall remain in the possession of the Recipients; provided, however, that all Springwich Confidential Information shall be returned to Springwich, all Metro Mobile Confidential Information shall be returned to Metro Mobile, and all Litchfield Confidential Information shall be returned to Litchfield, within 10 days after demand following a final decision of the FCC proceeding described herein, including any appeal therefrom. Confidential Information to be returned shall include all Confidential Information provided by Springwich, Metro Mobile, and Litchfield including any documents, data, testimony, studies, briefs, or materials in any form whatsoever created by Recipients bases upon or by reference to such Confidential Information.

14. Employees of Springwich shall not review or seek to review the Confidential Information provided by Metro Mobile and Litchfield, employees of Metro Mobile shall not review or seek to review the Confidential Information provided by Springwich and Litchfield, and employees of Litchfield shall not review or seek to review the Confidential Information provided by Springwich and Metro Mobile. Provided, however, that Springwich, Metro Mobile, and Litchfield will provide their Confidential Information to the outside counsel of each other.

APPENDIX C

Parties Filing Comments or Replies
in PR Docket Nos. 94-103, 94-105, 94-106, 94-108

Hawaii
PR Docket No. 94-103

BellSouth Corp. (BellSouth)
Cellular Telecommunications Industry Association (CTIA)
E.F. Johnson Co. (E.F. Johnson)
GTE Service Corp. (GTE)
Hawaii Public Utilities Commission (Hawaii or HPUC)
McCaw Cellular Communications, Inc. (McCaw)
Mobile Telecommunications Technologies Corp. (MTel)
National Cellular Resellers Association (NCRA)
Nextel Communications, Inc. (Nextel)
Personal Communications Industry Association (PCIA)

California
PR Docket No. 94-105

Airtouch Communications (Airtouch)
American Mobile Telecommunications Association, Inc. (AMTA)
Bakersfield Cellular Telephone Co. (Bakersfield)
Bay Area Cellular Telephone Co. (BACTC)
California Public Utilities Commission (California or CPUC)
Cellular Carriers Association of California (CCAC)
Cellular Resellers Association Inc. (Cellular Resellers or CRA)
Cellular Telecommunications Industry Association (CTIA)
County of Los Angeles (L.A. County)
E.F. Johnson Co. (E.F. Johnson)
GTE Service Corp. (GTE)
Los Angeles Cellular Telephone Co. (L.A. Cellular)
McCaw Cellular Communications, Inc. (McCaw)
Mobile Telecommunication Technologies Corp. (MTel)
National Cellular Resellers Association (NCRA)
Nextel Communications, Inc. (Nextel)
Paging Network, Inc. (Pagenet)
Personal Communications Industry Association (PCIA)
Utility Consumers' Action Network and Towards Utility Rate Normalization (UCAN/TURN)
US West Cellular of California (US West)
GTE Service Corp. (GTE)

Connecticut
PR Docket No. 94-106

American Mobile Telecommunications Association Inc. (AMTA)
Attorney General of the State of Connecticut (Connecticut Attorney General)
Bell Atlantic Metro Mobile Companies (Bell Atlantic or BAMMC)
Cellular Telecommunications Industry Association (CTIA)
Connecticut Department of Public Utility Control (Connecticut or DPUC)
Connecticut Office of Consumer Counsel (OCC)
Connecticut Telephone and Communication Systems (CTCS)
E.F. Johnson Co. (E.F. Johnson)
GTE Service Corporation (GTE)
McCaw Cellular Communications, Inc. (McCaw)
Mobile Telecommunication Technologies Corp. (MTel)
National Cellular Resellers Association (NCRA)
Nextel Communications, Inc. (Nextel)
Paging Network, Inc. (PageNet)
Personal Communications Industry Association (PCIA)
Springwich Cellular Limited Partnership (Springwich)

New York
PR Docket 94-108

Cellular Telecommunications Industry Association (CTIA)
Contel Cellular (Contel)
E.F. Johnson Co. (E.F. Johnson)
McCaw Cellular Communications Inc. (McCaw)
Mobile Telecommunications Technologies Corp. (MTel)
National Cellular Resellers Association (NCRA)
New York Public Service Commission (New York or NYPSC)
Nextel Communications (Nextel)
NYNEX Mobile Communications Co. (NYNEX)
Personal Communications Industry Association (PCIA)
Southwestern Bell Mobile Systems, Inc. (Southwestern Bell)
Vanguard Cellular Systems, Inc. (Vanguard)

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

The Prescription of Revised Percentages of Depreciation pursuant to the Communications Act of 1934, as amended for:

AT&T Communications
Ameritech-Illinois
Bell Atlantic-Delaware
Bell Atlantic-New Jersey
Cincinnati Bell Telephone Company
Citizens Utilities Company of California
Contel of New York, Inc.
GTE Midwest, Inc.
GTE North, Inc.
GTE Northwest, Inc.
GTE South, Inc.
Nevada Bell
Pacific Bell
US WEST Communications, Inc.

MEMORANDUM OPINION AND ORDER

Adopted: January 26, 1995; Released: January 31, 1995

By the Commission:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we prescribe depreciation rates and amortization schedules for thirteen local exchange carriers ("LECs") and AT&T. We determined these depreciation rates and amortization schedules after considering the studies underlying the carriers' requests, the views of the state commissions, and staff analysis and recommendations.

II. BACKGROUND

2. This Commission is required by the Communications Act of 1934 to prescribe the depreciation rates[1] that are used to compute depreciation expense for communications common carriers. In recent years, we have also prescribed amortization schedules in lieu of depreciation rates to resolve certain depreciation accounting problems. An amortization schedule specifies amounts to be charged to the depreciation expense each year. In accordance with our rules, depreciation rates are prescribed to fully depreciate the carriers' investments on a straight-line basis over the life of the associated plant. In order to accomplish this we use the following formula:

$$\text{depreciation rate} = \frac{100\% - \text{accumulated depreciation \%} - \text{future net salvage \%}}{\text{average remaining life}}$$

Both the average remaining life and future net salvage factors are based upon estimates,[2] which require periodic review to ensure their reasonableness.

3. It is our practice to review and revise each carrier's depreciation rates and amortization schedules once every three years. In doing so, we review depreciation factors for approximately one-third of the larger carriers each year. This process begins when carriers submit depreciation studies, which consist of a variety of data related to the carriers' recent plant retirements and plans for future plant retirements, along with their preliminary depreciation rate and amortization proposals. This year, as a result of the Commission's efforts to simplify its depreciation procedures, these carriers were given the opportunity to use projection life and future net salvage factors based upon the ranges adopted by the Commission for 22 of the 34 plant categories.[3] State commissions are encouraged to provide proposals as well, and many do. The Common Carrier Bureau ("Bureau") then independently analyzes carriers' data and proposals and prepares its own preliminary proposals, which are forwarded to the state commissions and the carriers. Representatives from the Bureau, the state commissions and the carriers then assemble to discuss the various proposals at "three-way meetings." At the conclusion of these meetings, the Bureau makes its recommendations. The carriers then formally file for revised depreciation rates that may or may not agree with the Bureau's recommendations and the Bureau issues a Public Notice requesting comments on the proposed depreciation rate changes.

4. This year, in accordance with our triennial schedule, the fourteen carriers listed in the caption submitted studies proposing revised depreciation rates and amortization schedules based upon revised estimates of the average remaining life, future net salvage, and on updated actual

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[1] *See generally* 47 U.S.C § 220(b). *See* Amortization of Depreciation Reserve Imbalances of Local Exchange Carriers, *Report and Order*, 3 FCC Rcd 984 (1988) (*Amortization Order*); *see also* The Prescription Percentages of Depreciation Pursuant to Section 220(b) of the Communications Act of 1934, as amended for: AT&T-Long Lines Department, *Order*, 96 FCC 2d 257 (1983); The Prescription of Revised Percentages of Depreciation pursuant to the Communications Act of 1934, as amended for: AT&T Communications *et. al.*, *Memorandum Opinion and Order*, 7 FCC Rcd 1050 (1992).

[2] Pursuant to our Rules, the depreciation rate for an account is a function of the average remaining life and future net salvage estimates and the actual accumulated depreciation ratio. The average remaining life is the estimated average of the future life expectancy of investment in a particular plant account. The future net salvage is the estimated gross salvage of the plant less any estimated cost of removal. The accumulated depreciation ratio is the ratio of the accumulated depreciation to the related plant in service. As such, it is the amount of plant investment that has been depreciated for a particular plant account. *See* 47 C.F.R. Section 32.2000(g)(2)(ii).

[3] *See* Simplification of the Depreciation Prescription Process, *Report and Order*, 8 FCC Rcd 8025 (1993) (*Depreciation Simplification Order*), *petitions for recon. pending*, *see also*, Further Order Inviting Comments, FCC 94-256 (released October 11, 1994); *Second Report and Order*, 9 FCC Rcd 3206 (1994).

accumulated depreciation ratios. Following the procedures outlined above, the Bureau proposed rates and amortization schedules in a *Public Notice* [4] released August 12, 1994. The Ameritech Operating Companies ("Ameritech") and the Missouri Public Service Commission ("Missouri")[5] filed comments. No reply comments were filed.

III. DISCUSSION

5. For all but four accounts of one carrier, we find that the rates and amortization schedules proposed by the carriers are consistent with the recommendations made by the Bureau at the close of the three-way meetings. As discussed earlier, these recommendations were made after a comprehensive review of carrier data and studies and after thorough discussion with representatives of the carriers and respective state commissions. We note further that no party objected to any of these proposed depreciation rates and schedules.[6] We, therefore, adopt these rates and schedules as specified in the Appendix.

6. Missouri objected to the proposed depreciation factors for four accounts: Circuit Equipment, Computers, Underground Cable-Metallic and Buried Cable-Metallic. Missouri proposed slightly longer projection lives for the Computers, Underground Cable-Metallic and Buried Cable-Metallic accounts and a slightly higher future net salvage percentage for the Circuit Equipment Account. Because the differences in proposed factors are so slight and the proposals are based primarily on forecasts of future events, it is not possible to determine, at present, which proposal is more accurate. We note, however, that the depreciation rates listed in the Appendix were thoroughly analyzed according to the Commission's depreciation practices, fully supported by GTE-Midwest, and were derived applying the same methods we used for all the other carriers. For these reasons we adopt the depreciation rates and amortization schedules listed in the Appendix. We note, however, that our resolution of this depreciation issue does not preclude Missouri from adopting different depreciation rates for intrastate ratemaking purposes.[7]

IV. CONCLUSION

7. Having considered the carriers' proposals, the studies upon which those proposals are based, the views and recommendations of the states, the responses to the Public Notice, and the Bureau's studies and analyses, we adopt the depreciation rates, amortization schedules, and effective dates listed in the Appendix.

V. ORDERING CLAUSES

8. ACCORDINGLY IT IS ORDERED, pursuant to Sections 4(i), 201-205 and 220(b) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 201-205 and 220(b), that the percentages of depreciation and amortization schedules set forth in the Appendix to this Order ARE PRESCRIBED, effective January 1, 1994.

9. IT IS FURTHER ORDERED, that this Order is effective upon release.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Appendix

[4] Comments Invited On Depreciation Rate Prescriptions Proposed For Domestic Telephone Carriers, *Public Notice*, 8 FCC Rcd 5535 (1994) (*Public Notice*).

[5] On September 21, 1994 (errata filed September 27,1994) Missouri filed a motion seeking leave to file its comments late and out of time. Missouri filed its comments after the reply comment deadline. For purposes of establishing a complete record, we accept Missouri's late-filed comments.

[6] Although Ameritech expresses a general dissatisfaction with certain of the Commission's depreciation practices, it does not challenge any of the rates and schedules proposed herein. See comments at 1-2.

[7] *See* Louisiana Public Service Commission v. Federal Communications Commission, 476 U.S. 355 (1986).

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
AT&T COMMUNICATIONS

Effective January 1, 1994

Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Accumulated Depreciation (%) C	Remaining Life Rate (%) D=(100%-B-C)/A
2112 MOTOR VEHICLES @	---	14	12.9	---
2114 TOOLS & OTH WORK EQUIP	3.3	0	14.6	25.9
2121 BUILDINGS	23.0	0	29.0	3.1
2122 FURNITURE *	---	0	-574.9	---
2123 OFFICE EQUIP #	---	0	-1277.2	---
2124 GENERAL PURPOSE COMPUTERS	3.0	0	3.7	32.1
2211 ELECTRONIC ANALOG +	---	-5	99.6	---
2212 ELECTRONIC DIGITAL	4.9	0	34.2	13.4
2220 OPERATOR SYSTEMS-MANUAL +	---	-1	98.2	---
2220 OPERATOR SYSTEMS-OSPS	4.7	1	27.0	15.3
2231 COE SATELLITE	7.4	0	62.9	5.0
2231 RADIO ANALOG @	---	-8	55.6	---
2231 RADIO DIGITAL	4.1	-5	62.6	10.3
2232 CIRCUIT ANALOG-DSR	---	-8	108.0	5.0
2232 CIRCUIT ANALOG-OTHER +	---	-8	104.7	---
2232 CIRCUIT DIGITAL-DSR	12.3	-5	25.2	6.5
2232 CIRCUIT DIGITAL-OTHER	3.5	-8	50.9	16.3
2351 PUBLIC TELEPHONE EQUIP	4.0	0	53.0	11.8
2362 OTHER TERMINAL	4.7	-2	16.3	18.2
2411 POLES	6.2	-22	74.2	7.7
2421 AERIAL CABLE-METAL +	---	-20	102.9	---
2421 AERIAL CABLE-NON METAL	13.9	0	22.8	5.6
2422 UG CABLE-METAL +	---	-7	99.4	---
2422 UG CABLE-NON MET	13.3	-4	20.2	6.3
2423 BURIED CABLE-METAL	1.6	-4	87.3	10.4
2423 BURIED CABLE-NON MET	14.0	-4	28.1	5.4
2424 SUBMARINE CABLE-METAL	1.4	-2	63.6	27.4
2424 SUBMARINE CABLE-NON MET	16.9	-2	17.2	5.0
2431 AERIAL WIRE	5.5	-73	155.8	3.1
2441 CONDUIT SYSTEMS	42.0	-8	7.6	2.4

The figures in Columns B, C, and D are percentages of gross book cost.

@ The net service value for the Motor Vehicles and the Radio Analog accounts are to be amortized over an eighteen month period ending June 30, 1995.

* The net service value for the Furniture Account is to be amortized over a twenty-four month period ending December 31, 1995.

The net service value for the Office Equipment Account is to be amortized over a thirty-six month period ending December 31, 1996.

+ The net service value for Electronic Analog, Operator Systems-Manual, Circuit Analog-Other, Aerial Cable Metallic and the UG Cable-Metallic accounts are to be amortized over a twelve month period ending December 31, 1994.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
AMERITECH - ILLINOIS

Effective January 1, 1994

Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Accumulated Depreciation (%) C	Remaining Life Rate (%) D=(100%-B-C)/A
2112 MOTOR VEHICLES	4.7	10	46.0	9.4
2115 GARAGE WORK EQ	8.3	-10	-56.6	20.1
2116 OTHER WORK EQ	6.3	5	37.5	9.1
2121 BUILDINGS	27.0	0	28.6	2.6
2122 FURNITURE	8.3	5	38.5	6.8
2123 OFFICE SUPPORT EQ	5.7	5	46.3	8.5
2123 COMPANY COMM EQ	7.1	0	9.5	12.7
2124 GEN PURPOSE COMPUTERS	2.6	5	59.6	13.6
2211 ANALOG ELEC SWITCHING	1.5	-1	58.1	28.6
2212 DIGITAL ELEC SWITCHING	10.3	1	27.5	6.9
2220 OPERATOR SYSTEMS	6.0	3	47.8	8.2
2231 RADIO SYSTEMS	8.6	12	20.1	7.9
2232 DIGITAL DATA SYSTEMS	3.2	0	72.8	8.5
2232 DIGITAL CIRCUIT	5.9	0	38.3	10.5
2232 ANALOG CIRCUIT	2.8	-3	56.5	16.6
2351 PUBLIC TEL TERM EQ	4.8	2	56.1	8.7
2362 OTHER TERM EQ	6.3	5	60.8	5.4
2411 POLES	24.0	-93	74.1	5.0
2421 AERIAL CABLE	13.3	-34	44.0	6.8
2422 UG CABLE-NONMETALLIC	16.0	-16	15.8	6.3
2422 UG CABLE-METALLIC	14.4	-8	49.9	4.0
2423 BUR CABLE-NONMETALLIC	18.6	0	28.7	3.8
2423 BUR CABLE-METALLIC	14.9	-10	39.1	4.8
2424 SUBMARINE CABLE	25.0	0	74.4	1.0
2426 IB CABLE-NONMETALLIC	15.4	-6	11.1	6.2
2426 IB CABLE-METALLIC	10.7	-16	58.2	5.4
2441 CONDUIT SYSTEMS	46.0	-5	25.2	1.7

The figures in Columns B, C, and D are percentages of gross book cost.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
BELL ATLANTIC - DELAWARE, INC.

Effective January 1, 1994

Rate Category Description		Average Remaining Life (years) A	Future Net Salvage (%) B	Accumulated Depreciation (%) C	Remaining Life Rate (%) D=(100%-B-C)/A
2112 MOTOR VEHICLES		3.7	12	42.9	12.2
2115 GARAGE WORK EQUIPMENT		8.4	2	2.9	11.3
2116 OTHER WORK EQUIPMENT		7.9	1	45.5	6.8
2121 BUILDINGS		28.0	3	28.6	2.4
2122 FURNITURE		7.5	2	35.4	8.3
2123 OFF/COMP COMM EQUIP		4.8	0	60.2	8.3
2124 COMPUTERS		3.5	5	38.2	16.2
2211 ANALOG SWITCHING		2.9	0	51.2	16.8
2212 DIGITAL SWITCHING		10.1	0	25.2	7.4
2212 DIGITAL SWITCHING-DMS 10	@	---	0	38.9	---
2220 OPERATOR SYSTEMS		8.1	0	-24.5	15.4
2231 RADIO SYSTEMS		4.7	-3	-20.0	26.2
2232 DIGITAL DATA SYSTEMS		4.7	0	51.2	10.4
2232 DIGITAL CIRCUIT EQ		5.8	6	41.0	9.1
2232 ANALOG CIRCUIT EQUIP.		3.9	-5	30.5	19.1
2351 PUBLIC TELEPHONE EQUIP		5.2	10	71.1	3.6
2362 OTHER TERM EQUIP		2.5	0	26.9	29.2
2411 POLES		22.0	-99	54.9	6.6
2421 AERIAL CABLE - METALLIC		11.2	-15	54.6	5.4
2421 AERIAL CABLE-NON MET		15.8	-12	15.4	6.1
2422 U.G.CABLE - METALLIC		13.8	-5	40.5	4.7
2422 U.G.CABLE- NON METALLIC		19.2	-15	19.5	5.0
2423 BURIED CABLE - METALLIC		13.0	-5	34.4	5.4
2423 BURIED CABLE - NON MET		18.1	-5	3.3	5.6
2424 SUBMARINE CABLE		9.3	0	63.5	3.9
2426 INTRABLDG CA - METALLIC		11.2	-19	53.7	5.8
2426 INTRABLDG CABLE-NON MET		12.8	-20	23.0	7.6
2441 CONDUIT SYSTEMS		34.0	-10	25.2	2.5

The figures in Columns B, C, and D are percentages of gross book cost.

@ The net service value for the Digital Switching-DMS 10 Account is to be amortized over a thirty-six month period ending December 31, 1996.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
BELL ATLANTIC - NEW JERSEY, INC.

Effective January 1, 1994

Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Accumulated Depreciation (%) C	Remaining Life Rate (%) D=(100%-B-C)/A
2112 MOTOR VEHICLES	3.6	10	41.5	13.5
2113 AIRCRAFT	1.5	30	61.4	5.7
2115 GARAGE WORK EQUIPMENT	6.8	0	30.7	10.2
2116 OTHER WORK EQUIPMENT	6.6	0	44.7	8.4
2121 BUILDINGS	28.0	3	29.3	2.4
2122 FURNITURE	8.4	0	36.2	7.6
2123 OFFICE SUPPORT EQPT	5.0	3	45.5	10.3
2123 COMPANY COMM EQUIPMENT	4.2	0	31.7	16.3
2124 COMPUTERS	3.0	0	57.7	14.1
2211 ANALOG SWITCHING	2.3	0	43.6	24.5
2212 DIGITAL SWITCHING	10.2	1	31.3	6.6
2220 OPERATOR SYS DIGITAL	6.8	3	33.7	9.3
2220 OPERATOR SYSTEMS ANALOG	---	0	100.0	5.0
2231 RADIO SYSTEMS	7.4	-5	56.9	6.5
2232 DIGITAL DATA SYSTEMS [a]	---	0	64.9	---
2232 DIGITAL CIRCUIT EQPT	5.7	0	37.6	10.9
2232 ANALOG CIRCUIT EQPT	4.9	-5	70.4	7.1
2351 PUBLIC TELEPHONES	4.7	3	51.1	9.8
2362 OTHER TERMINAL EQUIP	5.8	-3	28.5	12.8
2411 POLES	19.9	-129	60.4	8.5
2421 AERIAL CABLE - METALLIC	11.9	-8	42.3	5.5
2421 AERIAL CABLE - NON MET	17.2	-25	11.1	6.6
2422 U.G. CABLE - METALLIC	11.7	-27	49.6	6.6
2422 U.G. CABLE - NON MET	18.0	-20	19.2	5.6
2423 BURIED CABLE - METALLIC	12.8	-8	32.6	5.9
2423 BURIED CABLE - NON MET	19.1	-10	8.8	5.3
2424 SUBMARINE CABLE	11.2	-5	68.1	3.3
2426 INTRABLDG - METALLIC	10.5	-20	60.5	5.7
2426 INTRABLDG - NON MET	16.9	-10	8.6	6.0
2441 CONDUIT SYSTEMS	34.0	-10	26.8	2.4

The figures in Columns B, C, and D are percentages of gross book cost.

[a] The net service value for the Digital Data Systems Account is to be amortized over an eighteen month period ending June 30, 1995.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
CINCINNATI BELL TELEPHONE COMPANY - KENTUCKY

Effective January 1, 1994

Rate Category Description	Average Remaining Life	Future Net Salvage	Accumulated Depreciation	Remaining Life Rate
	(years) A	(%) B	(%) C	(%) D=(100%-B-C)/A
2112 MOTOR VEHICLES	4.0	10	45.9	11.0
2115 GARAGE WORK EQPT	8.1	-5	31.4	9.1
2116 OTHER WORK EQPT	9.3	5	30.1	7.0
2121 BUILDINGS	26.0	-5	19.0	3.3
2122 FURNITURE	10.5	7	22.8	6.7
2123 COMPANY COMMUN EQPT	4.7	2	49.0	10.4
2123 OFFICE SUPPORT EQPT	6.2	7	32.5	9.8
2124 GEN'L COMPUTERS	3.6	5	23.1	20.0
2211 ANALOG ELEC SWITCH	2.2	1	25.4	33.5
2212 DIGITAL ELEC SWITCH	9.5	3	3.5	9.8
2231 RADIO SYSTEMS	5.0	-9	74.3	6.9
2232 ANALOG CIRCUIT EQPT	4.1	-5	60.6	10.8
2232 DIGITAL CIRCUIT EQPT	5.9	4	33.6	10.6
2351 PUBLIC TEL TERM EQPT	5.4	1	61.9	6.9
2362 OTHER TERM EQPT	4.4	-4	19.0	19.3
2411 POLES	17.0	-69	42.0	7.5
2421 AERIAL CABLE METAL	13.8	-42	55.3	6.3
2421 AERIAL CABLE NON-METAL	18.5	-27	13.7	6.1
2422 UNDERGRD CABLE NON-METAL	18.5	-13	21.3	5.0
2422 UNDERGROUND CABLE METAL	14.1	-35	58.6	5.4
2423 BURIED CABLE METAL	18.0	-10	31.2	4.4
2423 BURIED CABLE NON-METAL	20.0	-5	15.2	4.5
2426 INTRABLD CABLE METAL	10.6	-48	63.0	8.0
2426 INTRABLD CABLE NON-METAL	11.0	-10	24.1	7.8
2431 AERIAL WIRE	10.2	-47	48.1	9.7
2441 CONDUIT SYSTEMS	39.0	-15	29.5	2.2

The figures in Columns B, C, and D are percentages of gross book cost.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
CINCINNATI BELL TELEPHONE COMPANY - OHIO

Effective January 1, 1994

Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Accumulated Depreciation (%) C	Remaining Life Rate (%) D=(100%-B-C)/A
2112 MOTOR VEHICLES	3.9	11	50.7	9.8
2115 GARAGE WORK EQPT	8.3	-5	22.1	10.0
2116 OTHER WORK EQPT	9.2	5	30.2	7.0
2121 BUILDINGS	29.0	-6	26.8	2.7
2122 FURNITURE	9.2	7	40.2	5.7
2123 COMPANY COMMUN EQPT	4.0	2	59.1	9.7
2123 OFFICE SUPPORT EQPT	6.5	7	48.1	6.9
2124 GEN'L COMPUTERS	3.0	5	52.6	14.1
2211 ANALOG ELEC SWITCH	2.0	1	50.4	24.3
2212 DIGITAL ELEC SWITCH	9.6	3	28.1	7.2
2215 CROSSBAR MECH SWITCH @	---	0	0.0	---
2220 DIGITAL OPR SYSTEMS	3.9	0	43.5	14.5
2220 OTHER OPR SYSTEMS	---	0	100.0	5.0
2231 RADIO SYSTEMS	5.5	-9	49.3	10.9
2232 ANALOG CIRCUIT EQPT	4.1	-5	65.5	9.6
2232 DIGITAL CIRCUIT EQPT	5.9	2	38.4	10.1
2351 PUBLIC TEL TERM EQPT	6.0	1	58.4	6.8
2362 OTHER TERM EQPT	4.6	-4	7.6	21.0
2411 POLES	18.3	-102	38.3	8.9
2421 AERIAL CABLE METAL	14.9	-49	52.4	6.5
2421 AERIAL CABLE NON-METAL	18.8	-17	11.7	5.6
2422 UNDERGRD CABLE NON-METAL	18.4	-13	20.8	5.0
2422 UNDERGROUND CABLE METAL	14.7	-49	53.0	6.5
2423 BURIED CABLE METAL	17.7	-7	27.9	4.5
2423 BURIED CABLE NON-METAL	20.0	-5	18.3	4.3
2426 INTRABLD CABLE METAL	11.2	-24	65.1	5.3
2426 INTRABLD CABLE NON-METAL	11.1	-10	24.7	7.7
2431 AERIAL WIRE	10.4	-44	55.9	8.5
2441 CONDUIT SYSTEMS	37.0	-15	35.1	2.2

The figures in Columns B, C, and D are percentages of gross book cost.

@ The net service value for the Crossbar Account is to be amortized over a twenty-four month period ending December 31, 1995.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
CITIZENS UTILITIES TELEPHONE COMPANY - CALIFORNIA

Effective January 1, 1994

Rate Category Description	Average Remaining Life	Future Net Salvage	Accumulated Depreciation	Remaining Life Rate
	(years)	(%)	(%)	(%)
	A	B	C	D=(100%-B-C)/A
2112 MOTOR VEHICLES	4.0	12	45.2	10.7
2114 SPEC'L PURPOSE VEHICLE	7.8	0	46.9	6.8
2115 GARAGE WORK EQUIP	4.8	0	67.4	6.8
2116 OTHER WORK EQUIPMENT	8.6	15	44.9	4.7
2121 BUILDINGS	29.0	-2	21.4	2.8
2122 FURNITURE	10.1	6	33.5	6.0
2123 OFFICE SUPPORT EQUIP	8.3	1	40.1	7.1
2123 COMPANY COMM EQUIP	4.1	0	40.0	14.6
2124 COMPUTERS-MAINFRAME	2.4	0	59.5	16.9
2124 COMPUTERS-PC	3.2	0	41.7	18.2
2212 DIGITAL ESS	8.6	0	32.3	7.9
2220 OPERATOR SYSTEMS	3.4	0	59.4	11.9
2231 OTHER RADIO FACILITIES	4.9	-4	50.3	11.0
2232 CIRCUIT EQUIPMENT	5.2	-1	53.2	9.2
2351 PUBLIC TEL EQUIP	4.7	2	59.9	8.1
2362 OTHER TERM EQUIP	3.1	0	54.6	14.6
2411 POLES	15.6	-50	55.5	6.1
2421 AERIAL CABLE-METAL	9.9	-12	52.2	6.0
2421 AERIAL CABLE-NONMET	18.7	-12	15.3	5.2
2422 UG CABLE-METAL	15.6	-10	31.4	5.0
2422 UG CABLE-NONMET	19.6	-3	11.6	4.7
2423 BURIED CABLE-METAL	12.2	-8	39.3	5.6
2423 BURIED CABLE-NONMET	18.0	-5	13.3	5.1
2431 AERIAL WIRE	2.2	-22	98.7	10.6
2441 CONDUIT SYSTEMS	43.0	-8	16.0	2.1

The figures in Columns B, C, and D are percentages of gross book cost.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
CONTEL OF NEW YORK, INC.

Effective January 1, 1994

Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Accumulated Depreciation (%) C	Remaining Life Rate (%) D=(100%-B-C)/A
2112 MOTOR VEHICLES	3.5	25	54.5	5.9
2114 SPEC PURPOSE VEHICLES	10.1	0	55.6	4.4
2115 GARAGE WORK EQ	11.3	0	48.6	4.5
2116 OTHER WORK EQ	8.4	20	43.3	4.4
2121 BUILDINGS	20.0	5	25.5	3.5
2122 FURNITURE	12.3	10	35.4	4.4
2123 OFFICE SUPPORT EQ	8.4	0	70.5	3.5
2123 COMPANY COMMUN EQ	6.4	0	50.9	7.7
2124 GEN PURPOSE COMPUTERS	4.0	5	56.9	9.5
2212 DIGITAL ELECTRONIC SW	9.0	1	28.3	7.9
2215 ELECTROMECHANICAL SW	0.9	2	79.8	20.2
2220 OPERATOR SYSTEMS	7.5	0	80.6	2.6
2231 RADIO SYSTEMS	6.9	0	57.9	6.1
2232 CIRCUIT EQ	4.6	3	35.5	13.4
2351 PUBLIC TELE TERM EQ	9.2	0	67.2	3.6
2362 OTHER TERMINAL EQ	3.8	0	75.3	6.5
2411 POLES	15.1	-47	36.4	7.3
2421 AERIAL CABLE METALLIC	12.1	-16	39.7	6.3
2421 AERIAL CABLE NONMETAL	15.0	-10	20.0	6.0
2422 UNDRGRD CABLE METALLIC	14.5	-9	33.3	5.2
2422 UNDRGRD CABLE NONMETAL	14.8	-5	20.0	5.7
2423 BURIED CABLE METALLIC	14.3	-5	32.4	5.1
2423 BURIED CABLE NONMETAL	16.7	0	22.7	4.6
2424 SUBMARINE CABLE	12.3	-2	30.5	5.8
2431 AERIAL WIRE	5.9	-150	204.4	7.7
2441 CONDUIT SYSTEMS	33.0	-3	24.8	2.4

The figures in Columns B, C, and D are percentages of gross book cost.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
GTE MIDWEST INC. - IOWA

Effective January 1, 1994

Rate Category Description	Average Remaining Life	Future Net Salvage	Accumulated Depreciation	Remaining Life Rate
	(years) A	(%) B	(%) C	(%) D=(100%-B-C)/A
2112 MOTOR VEHICLES	3.8	15	49.3	9.4
2115 GARAGE WORK EQ	10.2	0	20.9	7.8
2116 OTHER WORK EQ	6.9	10	50.3	5.8
2121 BUILDINGS	21.0	5	31.7	3.0
2122 FURNITURE	8.6	6	54.3	4.6
2123 COMPANY COMMUN EQ	5.8	-4	65.5	6.6
2123 OFFICE SUPPORT EQ	6.2	3	88.4	1.4
2124 GEN PURPOSE COMPUTERS	2.8	5	75.6	6.9
2211 ANALOG ELECTRONIC SW	2.5	-2	84.9	6.8
2212 DIGITAL ELECTRONIC SW	9.5	0	30.6	7.3
2215 ELECTRO-MECHANICAL SW	2.0	1	79.1	10.0
2231 RADIO SYSTEMS	2.4	0	94.8	2.2
2232 CIRCUIT EQUIPMENT	5.6	0	42.1	10.3
2362 OTHER TERM EQ	4.3	5	76.7	4.3
2411 POLES AND TOWERS	10.9	-73	63.7	10.0
2421 AERIAL METALLIC CBL	10.5	-35	57.0	7.4
2421 AERIAL NONMETAL CBL	15.6	-25	3.2	7.8
2422 UNDRGRND METALLIC CBL	14.7	-22	38.0	5.7
2422 UNDRGRND NONMETAL CBL	18.3	-18	10.9	5.9
2423 BURIED METALLIC CBL	12.7	-5	41.4	5.0
2423 BURIED NONMETAL CBL	17.3	-5	17.5	5.1
2424 SUBMARINE METALLIC CBL	19.1	0	34.7	3.4
2431 AERIAL WIRE	5.6	-40	27.1	20.2
2441 CONDUIT SYSTEMS	37.0	-3	34.8	1.8

The figures in Columns B, C, and D are percentages of gross book cost.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
GTE MIDWEST INC. - MINNESOTA

Effective January 1, 1994

Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Accumulated Depreciation (%) C	Remaining Life Rate (%) D=(100%-B-C)/A
2116 OTHER WORK EQ	5.7	5	60.4	6.1
2121 BUILDINGS	18.9	-12	22.2	4.8
2122 FURNITURE	12.5	5	9.2	6.9
2123 COMPANY COMMUN EQ	4.2	0	80.0	4.8
2212 DIGITAL ELECTRONIC SW	14.7	3	21.0	5.2
2215 ELECTRO-MECHANICAL SW	4.1	-3	77.9	6.1
2232 CIRCUIT EQUIPMENT	5.1	1	48.8	9.8
2351 PUBLIC TELE TERM EQ	1.7	10	81.7	4.9
2362 OTHER TERM EQ	2.5	0	68.2	12.7
2411 POLES AND TOWERS	7.1	-32	52.6	11.2
2421 AERIAL METAL CBL	12.2	-30	60.9	5.7
2422 UNDRGRND METALLIC CBL	21.0	-19	5.6	5.4
2422 UNDRGRND NONMETAL CBL	27.0	-19	9.4	4.1
2423 BURIED METALLIC CBL	12.9	-12	47.2	5.0
2423 BURIED NONMETAL CBL	21.0	-12	15.9	4.6
2441 CONDUIT SYSTEMS	34.0	-5	33.5	2.1

The figures in Columns B, C, and D are percentages of gross book cost.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
GTE MIDWEST INC. - MISSOURI

Effective January 1, 1994

Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Accumulated Depreciation (%) C	Remaining Life Rate (%) D=(100%-B-C)/A
2112 MOTOR VEHICLES	3.6	17	56.4	7.4
2113 AIRCRAFT	---	40	62.2	5.0
2115 GARAGE WORK EQ	10.4	0	30.2	6.7
2116 OTHER WORK EQ	9.6	10	43.8	4.8
2121 BUILDINGS	30.0	5	25.2	2.3
2122 FURNITURE	8.3	10	35.4	6.6
2123 COMPANY COMMUN EQ	7.8	3	42.9	6.9
2123 OFFICE SUPPORT EQ	8.1	7	40.9	6.4
2124 GEN PURPOSE COMPUTERS	3.5	6	59.4	9.9
2212 DIGITAL ELECTRONIC SW	8.4	10	31.4	7.0
2215 ELECTRO-MECHANICAL SW	3.2	-2	76.7	7.9
2220 OPERATOR SYSTEMS	6.4	0	9.8	14.1
2231 RADIO SYSTEMS	4.9	-1	74.9	5.3
2232 CIRCUIT EQUIP	5.1	3	54.1	8.4
2351 PUBLIC TELE TERM EQ	6.0	10	69.5	3.4
2362 OTHER TERMINAL EQ	3.7	3	69.6	7.4
2411 POLES AND TOWERS	11.3	-28	42.0	7.6
2421 AERIAL METALLIC CBL	11.9	-13	40.0	6.1
2421 AERIAL NONMETAL CBL	20.0	-5	16.7	4.4
2422 UNDRGRND METALLIC CBL	13.9	-5	33.4	5.2
2422 UNDRGRND NONMETAL CBL	20.0	-5	20.2	4.2
2423 BURIED METALLIC CBL	11.8	-4	30.3	6.2
2423 BURIED NONMETAL CBL	20.0	-5	21.8	4.2
2424 SUBMARINE CBL METALLIC	13.9	-3	35.9	4.8
2424 SUBMARINE CBL NONMETAL	17.1	-3	18.9	4.9
2426 INTRABLDG NETWORK CBL	10.9	0	51.1	4.5
2431 AERIAL WIRE	---	-61	161.0	5.0
2441 CONDUIT SYSTEMS	41.0	0	23.5	1.9

The figures in Columns B, C, and D are percentages of gross book cost.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
GTE MIDWEST INC. - NEBRASKA

Effective January 1, 1994

Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Accumulated Depreciation (%) C	Remaining Life Rate (%) D=(100%-B-C)/A
2112 MOTOR VEHICLES	3.5	13	63.7	6.7
2116 OTHER WORK EQ	8.2	5	59.0	4.4
2121 BUILDINGS	19.2	4	23.8	3.8
2122 FURNITURE	---	4	96.0	5.0
2123 COMPANY COMMUN EQ	---	5	95.0	5.0
2123 OFFICE SUPPORT EQ	7.5	5	38.3	7.6
2124 GEN PURPOSE COMPUTERS	3.8	5	48.4	12.3
2212 DIGITAL ELECTRONIC SW	9.8	3	30.9	6.7
2215 ELECTRO-MECHANICAL SW	1.5	-3	102.7	0.2
2232 CIRCUIT EQUIP	5.9	4	48.0	8.1
2351 PUBLIC TELE TERM EQ	4.7	5	82.6	2.6
2362 OTHER TERMINAL EQ	3.9	4	80.2	4.1
2411 POLES AND TOWERS	15.4	-67	88.7	5.1
2421 AERIAL METALLIC CBL	12.2	-40	72.8	5.5
2421 AERIAL NONMETAL CBL	15.5	-25	39.7	5.5
2422 UNDRGRND METALLIC CBL	15.3	-25	28.7	6.3
2422 UNDRGRND NONMETAL CBL	15.8	-20	17.5	6.5
2423 BURIED METALLIC CBL	12.9	-10	36.2	5.7
2423 BURIED NONMETAL CBL	17.6	-10	15.2	5.4
2426 INTRABLDG NETWORK CBL	10.9	-25	68.6	5.2
2431 AERIAL WIRE	5.3	-150	71.0	33.8
2441 CONDUIT SYSTEMS	40.0	-10	32.8	1.9

The figures in Columns B, C, and D are percentages of gross book cost.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
GTE NORTH INC. - ILLINOIS

Effective January 1, 1994

Rate Category Description	Average Remaining Life	Future Net Salvage	Accumulated Depreciation	Remaining Life Rate
	(years)	(%)	(%)	(%)
	A	B	C	D=(100%-B-C)/A
2112 MOTOR VEHICLES	3.5	15	61.8	6.6
2115 GARAGE WORK EQ	8.6	0	34.2	7.7
2116 OTHER WORK EQ	7.1	0	65.6	4.8
2121 BUILDINGS	24.0	0	29.0	3.0
2122 FURNITURE	7.5	5	52.7	5.6
2123 OFFICE SUPPORT EQ	6.4	1	47.1	8.1
2123 COMPANY COMMUN EQ	6.4	1	69.8	4.6
2124 GEN PURPOSE COMPUTERS	2.5	5	47.0	19.2
2211 ANALOG ELECTRONIC SW	1.8	3	64.5	18.1
2212 DIGITAL ELECTRONIC SW	8.6	3	35.1	7.2
2215 ELECTROMECHANICAL SW	2.5	-4	77.1	10.8
2220 OPERATOR SYSTEMS	9.3	-2	27.5	8.0
2231 RADIO SYSTEMS	3.4	0	88.0	3.5
2232 CIRCUIT EQ	5.8	0	54.1	7.9
2351 PUBLIC TELE TERM EQ	---	10	90.0	5.0
2362 OTHER TERMINAL EQ	3.6	1	87.5	3.2
2411 POLES	13.5	-86	75.5	8.2
2421 AERIAL CABLE METALLIC	13.2	-56	61.7	7.1
2421 AERIAL CABLE NONMETAL	15.1	-25	26.6	6.5
2422 UNDRGRD CABLE METALLIC	14.1	-25	35.8	6.3
2422 UNDRGRD CABLE NONMETAL	19.8	-13	20.0	4.7
2423 BURIED CABLE METALLIC	12.5	-10	43.9	5.3
2423 BURIED CABLE NONMETAL	16.8	-10	17.2	5.5
2424 SUBMARINE CABLE	11.0	0	69.4	2.8
2431 AERIAL WIRE	---	-86	186.0	5.0
2441 CONDUIT SYSTEMS	35.0	0	27.8	2.1

The figures in Columns B, C, and D are percentages of gross book cost.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
GTE NORTH INC. - MICHIGAN

Effective January 1, 1994

Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Accumulated Depreciation (%) C	Remaining Life Rate (%) D=(100%-B-C)/A
2112 MOTOR VEHICLES	3.5	12	55.6	9.3
2115 GARAGE WORK EQ	5.9	0	57.0	7.3
2116 OTHER WORK EQ	5.8	5	52.4	7.3
2121 BUILDINGS	26.0	-3	30.1	2.8
2122 FURNITURE	8.3	5	67.2	3.3
2123 OFFICE SUPPORT EQ	3.7	1	78.1	5.6
2123 COMPANY COMMUN EQ	4.0	1	67.8	7.8
2124 GEN PURPOSE COMPUTERS	2.7	5	43.3	19.1
2211 ANALOG ELECTRONIC SW	3.1	0	74.7	8.2
2212 DIGITAL ELECTRONIC SW	9.4	0	32.1	7.2
2215 ELECTROMECHANICAL SW	3.4	0	56.2	12.9
2220 OPERATOR SYSTEMS	12.3	-2	26.7	6.1
2231 RADIO SYSTEMS	4.4	-5	90.5	3.3
2232 CIRCUIT EQ	6.2	2	43.5	8.8
2351 PUBLIC TELE TERM EQ	3.8	5	66.7	7.4
2362 OTHER TERMINAL EQ	3.9	1	84.3	3.8
2411 POLES	12.9	-60	71.1	6.9
2421 AERIAL CABLE METALLIC	15.8	-45	57.2	5.6
2421 AERIAL CABLE NONMETAL	17.0	-20	13.1	6.3
2422 UNDRGRD CABLE METALLIC	13.9	-15	38.4	5.5
2422 UNDRGRD CABLE NONMETAL	20.0	-10	9.0	5.1
2423 BURIED CABLE METALLIC	13.3	-10	37.0	5.5
2423 BURIED CABLE NONMETAL	17.3	-10	10.4	5.8
2424 SUBMARINE CABLE	8.1	-2	65.3	4.5
2426 INTRABUILDING CABLE	11.7	-12	39.9	6.2
2431 AERIAL WIRE	5.1	-50	73.5	15.0
2441 CONDUIT SYSTEMS	39.0	-8	29.7	2.0

The figures in Columns B, C, and D are percentages of gross book cost.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
GTE SOUTH INC. - KENTUCKY

Effective January 1, 1994

Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Accumulated Depreciation (%) C	Remaining Life Rate (%) D=(100%-B-C)/A
2112 MOTOR VEHICLES	3.8	19	42.3	10.2
2115 GARAGE WORK EQ	7.5	0	56.6	5.8
2116 OTHER WORK EQ	7.6	5	51.0	5.8
2121 BUILDINGS	24.0	8	28.0	2.7
2122 FURNITURE	8.7	10	50.1	4.6
2123 OFFICE SUPPORT EQ	6.1	7	57.5	5.8
2123 COMPANY COMMUN EQ	5.7	10	57.2	5.8
2124 GEN PURPOSE COMPUTERS	2.8	5	79.3	5.6
2211 ANALOG ELECTRONIC SW	2.0	-1	54.9	23.1
2212 DIGITAL ELECTRONIC SW	8.2	4	34.1	7.5
2215 ELECTROMECHANICAL SW @	---	0	10.1	---
2220 OPERATOR SYSTEMS	5.8	-2	3.3	17.0
2231 RADIO SYSTEMS	3.7	-2	82.7	5.2
2232 CIRCUIT EQUIPMENT	5.6	2	35.1	11.2
2351 PUBLIC TELE TERM EQ	4.9	2	64.7	6.8
2362 OTHER TERMINAL EQ	3.2	3	93.1	1.2
2411 POLES	14.4	-31	39.2	6.4
2421 AERIAL METALLIC CBL	13.1	-31	44.2	6.6
2421 AERIAL NONMETAL CBL	14.8	-12	16.8	6.4
2422 UNDRGRND METALLIC CBL	14.3	-10	37.9	5.0
2422 UNDRGRND NONMETAL CBL	17.8	-10	9.3	5.7
2423 BURIED METALLIC CBL	10.0	-3	32.8	7.0
2423 BURIED NONMETAL CBL	17.2	-1	16.0	4.9
2424 SUBMARINE CABLE	15.8	-1	27.8	4.6
2426 INTRABLDG NETWORK CBL	10.5	-10	20.2	8.6
2431 AERIAL WIRE	2.8	-50	94.9	19.7
2441 CONDUIT SYSTEMS	33.0	-1	30.3	2.1

The figures in Columns B, C, and D are percentages of gross book cost.

@ The net service value for the Electromechanical Switching Account is to be amortized over a thirty-six month period ending December 31, 1996.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
GTE SOUTH INC. - NORTH CAROLINA

Effective January 1, 1994

Rate Category Description	Average Remaining Life	Future Net Salvage	Accumulated Depreciation	Remaining Life Rate
	(years) A	(%) B	(%) C	(%) D=(100%-B-C)/A
2112 MOTOR VEHICLES	3.9	19	55.6	6.5
2115 GARAGE WORK EQ	9.5	0	65.2	3.7
2116 OTHER WORK EQ	7.9	0	44.1	7.1
2121 BUILDINGS	30.0	10	16.4	2.5
2122 FURNITURE	7.6	10	54.1	4.7
2123 OFFICE SUPPORT EQ	6.2	2	56.1	6.8
2123 COMPANY COMMUN EQ	4.9	0	56.0	9.0
2124 GEN PURPOSE COMPUTERS	4.0	3	15.9	20.3
2212 DIGITAL ELECTRONIC SW	8.6	5	33.5	7.2
2220 OPERATOR SYSTEMS	3.2	0	16.1	26.2
2231 RADIO SYSTEMS	3.1	0	61.9	12.3
2232 CIRCUIT EQUIPMENT	5.0	0	41.8	11.6
2351 PUBLIC TELE TERM EQ	4.9	7	71.7	4.3
2362 OTHER TERMINAL EQ	1.8	-5	95.5	5.3
2411 POLES	14.8	-42	47.2	6.4
2421 AERIAL METALLIC CBL	12.0	-10	36.7	6.1
2421 AERIAL NONMETAL CBL	14.4	-5	21.4	5.8
2422 UNDERGROUND MET CBL	14.3	-17	29.4	6.1
2422 UNDERGROUND NONMET CBL	18.0	-12	17.9	5.2
2423 BURIED METALLIC CBL	10.1	-2	37.9	6.3
2423 BURIED NONMETAL CBL	15.9	-5	22.6	5.2
2426 INTRABLDG NETWORK CBL	10.6	-5	41.0	6.0
2431 AERIAL WIRE	6.2	-75	154.2	3.4
2441 CONDUIT SYSTEMS	35.0	-1	21.4	2.3

The figures in Columns B, C, and D are percentages of gross book cost.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
GTE NORTHWEST INC. - IDAHO

Effective January 1, 1994

Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Accumulated Depreciation (%) C	Remaining Life Rate (%) D=(100%-B-C)/A
2112 MOTOR VEHICLES	3.5	16	35.4	8.2
2115 GARAGE WORK EQ	10.1	5	45.9	4.9
2116 OTHER WORK EQ	8.2	10	41.8	5.9
2121 BUILDINGS	22.0	0	25.8	3.4
2122 FURNITURE	11.8	10	26.8	5.4
2123 OFFICE SUPPORT EQ	7.6	10	53.6	4.8
2123 COMPANY COMMUN. EQ	2.9	0	85.1	5.1
2124 GEN. PURP. COMPUTERS	3.2	5	33.9	19.1
2212 DIGITAL ELECT SW	9.4	3	24.8	7.7
2215 ELECTROMECH SW [a]	---	-2	36.6	---
2220 OPERATOR SYSTEMS	7.4	-2	21.1	10.9
2231 RADIO SYSTEMS	7.3	0	42.0	7.9
2232 CIRCUIT EQUIPMENT	7.0	6	27.3	9.5
2351 PUBLIC TELE TERM EQ	5.2	5	46.9	9.3
2362 OTHER TERMINAL EQ	4.2	0	87.4	3.0
2411 POLE & TOWERS	15.5	-60	61.3	6.4
2421 AERIAL CBL METAL	13.7	-30	39.4	6.6
2421 AERIAL CBL NONMETAL	18.3	-10	13.2	5.3
2422 UNDERGRD CABLE METAL	17.8	-20	27.8	5.2
2422 UNDER CABLE NONMETAL	18.1	-5	14.9	5.0
2423 BURIED CABLE METAL	13.5	-10	29.6	6.0
2423 BURIED CBL NONMETAL	18.5	-5	8.4	5.2
2424 SUBMARINE CABLE	15.3	-10	36.9	4.8
2426 INTRABLDG CBL METAL	10.8	-30	67.6	5.8
2431 AERIAL WIRE	11.1	-30	113.4	1.5
2441 UNDERGROUND CONDUIT	37.0	-5	22.6	2.2

The figures in Columns B, C, and D are percentages of gross book cost.

[a] The net service value for the Electromechanical Switching Account is to be amortized over a twenty-four month period ending December 31, 1995.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
GTE NORTHWEST INC. - OREGON

Effective January 1, 1994

Rate Category Description		Average Remaining Life (years) A	Future Net Salvage (%) B	Accumulated Depreciation (%) C	Remaining Life Rate (%) D=(100%-B-C)/A
2112 MOTOR VEHICLES		4.1	16	48.7	8.6
2115 GARAGE WORK EQ		11.3	5	32.2	5.6
2116 OTHER WORK EQ		8.4	10	38.6	6.1
2121 BUILDINGS		30.0	0	19.9	2.7
2122 FURNITURE		11.8	10	2.2	7.4
2123 OFFICE SUPPORT EQ		7.9	10	42.9	6.0
2123 COMPANY COMMUN. EQ		3.1	0	82.8	5.5
2124 GEN. PURP. COMPUTERS		3.4	5	50.2	13.2
2211 ANALOG ELECT SW	@	---	-2	78.5	---
2212 DIGITAL ELECT SW		9.6	3	25.5	7.4
2215 ELECTROMECH SW	@	---	-2	-8.1	---
2220 OPERATOR SYSTEMS		7.4	-2	30.6	9.6
2231 RADIO SYSTEMS		6.5	-5	14.6	13.9
2232 CIRCUIT EQUIPMENT		5.7	4	37.1	10.3
2351 PUBLIC TELE TERM EQ		6.0	5	65.2	5.0
2362 OTHER TERMINAL EQ		3.4	0	86.2	4.1
2411 POLE & TOWERS		15.4	-63	69.7	6.1
2421 AERIAL CBL METAL		13.5	-31	48.6	6.1
2421 AERIAL CBL NONMETAL		18.1	-10	10.2	5.5
2422 UNDERGRD CABLE METAL		17.7	-20	30.2	5.1
2422 UNDER CABLE NONMETAL		17.8	-5	17.4	4.9
2423 BURIED CABLE METAL		14.4	-10	32.9	5.4
2423 BURIED CBL NONMETAL		18.0	-5	14.4	5.0
2424 SUBMARINE CABLE		9.8	-10	66.3	4.5
2426 INTRABLDG CBL METAL		11.2	-30	75.0	4.9
2431 AERIAL WIRE		13.0	-30	99.4	2.4
2441 UNDERGROUND CONDUIT		41.0	-5	17.4	2.1

The figures in Columns B, C, and D are percentages of gross book cost.

@ The net service value for the Analog Switching and the Electromechanical Switching accounts are to amortized over a thirty-six month period ending December 31, 1996.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
GTE NORTHWEST INC. - WASHINGTON

Effective January 1, 1994

Rate Category Description	Average Remaining Life	Future Net Salvage	Accumulated Depreciation	Remaining Life Rate
	(years) A	(%) B	(%) C	(%) D=(100%-B-C)/A
2112 MOTOR VEHICLES	4.5	20	56.4	5.2
2115 GARAGE WORK EQ	10.8	5	34.5	5.6
2116 OTHER WORK EQ	8.4	10	37.9	6.2
2121 BUILDINGS	29.0	0	16.1	2.9
2122 FURNITURE	11.6	10	17.6	6.2
2123 OFFICE SUPPORT EQ	7.7	10	44.2	5.9
2123 COMPANY COMMUN. EQ	3.5	0	72.7	7.8
2124 GEN. PURP. COMPUTERS	4.4	5	-9.7	23.8
2211 ANALOG ELECT SW	0.7	0	70.3	42.4
2212 DIGITAL ELECT SW	9.5	3	29.0	7.2
2215 ELECTROMECH SW @	---	-2	83.6	---
2220 OPERATOR SYSTEMS	7.7	-2	59.4	5.5
2231 RADIO SYSTEMS	7.5	0	36.1	8.5
2232 CIRCUIT EQUIPMENT	6.3	4	33.5	9.9
2351 PUBLIC TELE TERM EQ	4.9	10	50.0	8.2
2362 OTHER TERMINAL EQ	5.2	5	65.5	5.7
2411 POLE & TOWERS	15.9	-75	62.2	7.1
2421 AERIAL CBL METAL	11.7	-27	45.6	7.0
2421 AERIAL CBL NONMETAL	17.8	-5	22.5	4.6
2422 UNDERGRD CABLE METAL	16.0	-15	36.3	4.9
2422 UNDER CABLE NONMETAL	17.6	-5	26.3	4.5
2423 BURIED CABLE METAL	13.9	-5	30.1	5.4
2423 BURIED CBL NONMETAL	17.9	-5	16.3	5.0
2424 SUBMARINE CABLE	10.6	-10	50.4	5.6
2426 INTRABLDG CBL METAL	11.3	-30	70.6	5.3
2431 AERIAL WIRE	11.3	-15	112.2	0.2
2441 UNDERGROUND CONDUIT	37.0	-5	20.1	2.3

The figures in Columns B, C, and D are percentages of gross book cost.

@ The net service value for the Electromechanical Switching Account is to be amortized over a thirty-six month period ending December 31, 1996.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
NEVADA BELL

Effective January 1, 1994

Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Accumulated Depreciation (%) C	Remaining Life Rate (%) D=(100%-B-C)/A
2112 MOTOR VEHICLES	3.6	15	67.5	4.9
2114 SPECIAL PURPOSE VEHICLES	14.5	0	56.1	3.0
2115 GARAGE WORK EQUIP	15.4	0	3.6	6.3
2116 OTHER WORK EQUIPMENT	12.9	6	37.6	4.4
2121 BUILDINGS	28.0	-2	21.5	2.9
2122 FURNITURE	7.2	0	8.2	12.8
2123 OFFICE EQUIPMENT	3.5	0	22.3	22.2
2124 GENERAL PURPOSE COMPUTERS	2.5	0	50.7	19.7
2211 ELECTRONIC ANALOG [a]	---	0	0.0	---
2212 ELECTRONIC DIGITAL	9.9	4	28.8	6.8
2215 ELECTROMECH SWITCH	1.5	-9	79.5	19.7
2220 OPERATOR SYSTEMS	3.9	0	50.7	12.6
2231 RADIO SYSTEMS	4.4	0	65.3	7.9
2232 CIRCUIT DDS	4.7	0	60.3	8.4
2232 CIRCUIT DIGITAL	5.6	1	31.6	12.0
2232 CIRCUIT ANALOG	5.1	0	50.2	9.8
2341 PBX DDS	---	0	100.0	5.0
2351 PUBLIC TEL. EQUIP.	2.8	0	81.5	6.6
2362 OTHER TERMINAL EQUIP	2.3	-1	85.5	6.7
2411 POLE LINES	16.6	-26	83.6	2.6
2421 AERIAL CABLE EXCH	10.9	-9	62.1	4.3
2421 AERIAL CABLE INT MET	3.9	-21	78.1	11.0
2421 AERIAL CABLE NON MET	21.0	-10	9.1	4.8
2422 UG CABLE EX MET	14.0	-2	45.4	4.0
2422 UG CABLE INT MET	7.9	-5	50.7	6.9
2422 UG CABLE NON MET	20.0	-5	12.9	4.6
2423 BURIED CABLE EXCH MET	14.4	-3	35.8	4.7
2423 BURIED CABLE INT MET	4.4	0	68.4	7.2
2423 BURIED CABLE NONMET	20.0	0	16.1	4.2
2426 INTRABLDG NETWORK CABLE	9.4	-2	67.4	3.7
2431 AERIAL WIRE	4.4	-25	119.8	1.2
2441 CONDUIT SYSTEMS	35.0	-3	23.7	2.3

The figures in Columns B, C, and D are percentages of gross book cost.

[a] The amortization amount for the Electronic Analog Account ordered in FCC 92-38, released January 31, 1992, is continued.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
PACIFIC BELL

Effective January 1, 1994

Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Accumulated Depreciation (%) C	Remaining Life Rate (%) D=(100%-B-C)/A
2112 MOTOR VEHICLES	3.7	12	53.5	9.3
2114 SPECIAL PURPOSE VEHICLE	4.5	51	43.9	1.1
2115 GARAGE WORK EQPT	7.0	-6	47.4	8.4
2116 OTHER WORK EQUIPMENT	9.5	3	34.7	6.6
2121 BUILDINGS	30.0	-4	14.3	3.0
2122 FURNITURE	11.1	3	1.2	8.6
2123 OFFICE SUPPORT EQPT	6.5	3	31.2	10.1
2123 COMPANY COMMUNICATION EQPT	5.6	-1	32.1	12.3
2124 GENENAL PURPOSE COMPUTERS	3.0	1	63.6	11.8
2211 ANALOG ELECTRONIC SWITCHING @	---	-1	48.8	---
2212 DIGITAL ELECTRONIC SWITCHING	9.6	3	28.9	7.1
2220 OPERATOR SYSTEMS-XBAR	7.2	-2	86.6	2.1
2220 OPERATOR SYSTEMS-ANALOG	---	-3	103.0	5.0
2220 OPERATOR SYSTEMS-DIGITAL	5.4	5	43.0	9.6
2231 RADIO SYSTEMS	6.5	-2	46.7	8.5
2232 DIGITAL DATA SYSTEMS	3.0	-4	79.3	8.2
2232 DIGITAL CIRCUIT-OTHER	5.8	1	49.4	8.6
2232 ANALOG CIRCUIT-OTHER	4.5	0	66.6	7.4
2351 PUBLIC TELEPHONE TERM EQPT	3.0	8	77.8	4.7
2362 OTHER TERMINAL EQPT	1.9	-3	61.2	22.0
2411 POLES	17.5	-110	66.1	8.2
2421 AERIAL CABLE METALLIC-EXCH	11.2	-14	46.1	6.1
2421 AERIAL CABLE NONMETALLIC	20.0	-12	14.3	4.9
2421 AERIAL CABLE METAL-INTEROFC	3.2	-10	88.4	6.8
2422 UG CABLE METALLIC-EXCH	15.0	-12	40.6	4.8
2422 UG CABLE NONMETALLIC	18.6	-6	29.3	4.1
2422 UG CABLE METAL-INTEROFC	4.1	-3	63.7	9.6
2423 BURIED CABLE METAL-EXCH	13.3	-6	43.5	4.7
2423 BURIED CABLE NONMETALLIC	19.5	-3	35.5	3.5
2423 BURIED CABLE METAL-INTEROFC	3.5	-2	71.2	8.8
2424 SUBMARINE CABLE	11.5	-12	109.8	0.2
2426 INTRBLDG NET CABLE-MET	4.9	-14	53.6	12.3
2426 INTRBLDG NET CABLE-NONMET	20.0	-7	0.4	5.3
2431 AERIAL WIRE	4.3	-39	95.3	10.2
2441 UNDERGROUND CONDUIT	42.0	-10	26.7	2.0

The figures in Columns B, C, and D are percentages of gross book cost.

@ The net service value for the Analog Electronic Switching Account is to be amortized over a sixty month period ending December 31, 1998.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
U S WEST COMMUNICATIONS, INC. - ARIZONA

Effective January 1, 1994

Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Accumulated Depreciation (%) C	Remaining Life Rate (%) D=(100%-B-C)/A
2112 MOTOR VEHICLES	4.1	10	64.0	6.3
2114 SPEC PURPOSE VEHICLE	12.3	0	8.1	7.5
2115 GARAGE WORK EQUIP	12.6	-4	-1.1	8.3
2116 OTHER WORK EQUIP	12.9	8	-4.3	7.5
2121 BUILDINGS	27.0	-10	23.6	3.2
2122 FURNITURE	7.3	3	-16.7	15.6
2123 OFFICE EQUIPMENT	6.0	0	15.2	14.1
2123 COMPANY COMM EQUIP	3.6	-1	42.3	16.3
2124 GEN PURPOSE CMPTR	2.8	5	44.1	18.2
2211 ANALOG SW EQUIP	2.8	2	49.0	17.5
2212 DIGITAL SW EQUIP	9.8	3	24.9	7.4
2215 STEP BY STEP EQUIP [a]	---	-7	53.8	---
2220 OPERATOR SYSTEMS	4.4	0	54.7	10.3
2231 RADIO SYSTEMS	7.6	-4	41.8	8.2
2232 CIRCUIT ANALOG	3.6	-4	75.2	8.0
2232 CIRCUIT DDS	3.6	4	57.6	10.7
2232 CIRCUIT DIGITAL	7.0	2	42.6	7.9
2351 PUB TEL TERM EQUIP	4.5	5	80.3	3.3
2362 OTHER TERM EQUIP	4.7	2	41.6	12.0
2411 POLE LINES	10.7	-42	54.9	8.1
2421 AERIAL CABLE MET	12.6	-15	42.3	5.8
2421 AERIAL CABLE NON MET	14.8	-15	-1.7	7.9
2422 UNDGRD CABLE MET	12.8	-10	40.0	5.5
2422 UNDGRD CABLE NON MET	21.0	-10	16.3	4.5
2423 BURIED CABLE MET	14.3	-2	35.4	4.7
2423 BURIED CABLE NON MET	20.0	-2	14.5	4.4
2424 SUB CABLE MET	17.2	0	-72.7	10.0
2424 SUB CABLE NON MET	30.0	0	0.0	3.3
2426 INTRA BLDG CA MET	10.1	-7	52.5	5.4
2426 INTRA BLDG NON MET	14.7	-6	-0.7	7.3
2431 AERIAL WIRE	6.6	-41	44.0	14.7
2441 CONDUIT SYSTEMS	45.0	-7	20.0	1.9

The figures in Columns B, C, and D are percentages of gross book cost.

[a] The net service value for the Step-By-Step Account is to be amortized over a twenty-four month period ending December 31, 1995.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
U S WEST COMMUNICATIONS, INC. - COLORADO

Effective January 1, 1994

Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Accumulated Depreciation (%) C	Remaining Life Rate (%) D=(100%-B-C)/A
2112 MOTOR VEHICLES	3.4	10	55.6	10.1
2113 AIRCRAFT	---	56	44.0	5.0
2114 SPEC PURPOSE VEHICLE	10.4	2	55.3	4.1
2115 GARAGE WORK EQUIP	12.5	0	18.2	6.5
2116 OTHER WORK EQUIP	11.9	2	24.7	6.2
2121 BUILDINGS	29.0	-10	24.5	2.9
2122 FURNITURE	9.6	1	1.8	10.1
2123 OFFICE EQUIPMENT	5.5	1	-2.7	18.5
2123 COMPANY COMM EQUIP	4.6	0	57.4	9.3
2124 GEN PURPOSE CMPTR	3.2	5	33.4	19.3
2211 ANALOG SW EQUIP	3.0	1	49.5	16.5
2212 DIGITAL SW EQUIP	10.0	3	21.8	7.5
2215 STEP BY STEP EQUIP [a]	---	-5	95.2	---
2220 OPERATOR SYSTEMS	---	0	100.0	5.0
2231 RADIO SYSTEMS	6.5	1	40.9	8.9
2232 CIRCUIT ANALOG	3.0	-2	71.8	10.1
2232 CIRCUIT DDS	3.8	3	61.7	9.3
2232 CIRCUIT DIGITAL	7.0	4	37.9	8.3
2351 PUB TEL TERM EQUIP	4.5	5	81.6	3.0
2362 OTHER TERM EQUIP	7.2	-4	56.6	6.6
2411 POLE LINES	11.2	-66	76.8	8.0
2421 AERIAL CABLE MET	12.2	-41	47.0	7.7
2421 AERIAL CABLE NON MET	14.5	-30	12.1	8.1
2422 UNDGRD CABLE MET	12.7	-23	40.2	6.5
2422 UNDGRD CABLE NON MET	19.4	-12	15.7	5.0
2423 BURIED CABLE MET	14.2	-3	32.9	4.9
2423 BURIED CABLE NON MET	19.4	-3	12.6	4.7
2424 SUB CABLE MET	17.7	0	43.7	3.2
2424 SUB CABLE NON MET	17.2	0	28.2	4.2
2426 INTRA BLDG CA MET	8.2	-4	51.6	6.4
2426 INTRA BLDG NON MET	17.1	-4	14.2	5.3
2431 AERIAL WIRE	4.7	-153	129.6	26.3
2441 CONDUIT SYSTEMS	41.0	-10	21.0	2.2

The figures in Columns B, C, and D are percentages of gross book cost.

[a] The net service value for the Step-By-Step Account is to be amortized over a twelve month period ending December 31, 1994.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
U S WEST COMMUNICATIONS, INC. - NEW MEXICO

Effective January 1, 1994

Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Accumulated Depreciation (%) C	Remaining Life Rate (%) D=(100%-B-C)/A
2112 MOTOR VEHICLES	3.7	8	55.7	9.8
2114 SPEC PURPOSE VEHICLE	14.0	0	0.0	7.1
2115 GARAGE WORK EQUIP	12.9	0	-70.3	13.2
2116 OTHER WORK EQUIP	11.8	2	3.1	8.0
2121 BUILDINGS	25.0	-6	26.7	3.2
2122 FURNITURE	9.2	0	0.4	10.8
2123 OFFICE EQUIPMENT	5.7	0	43.6	9.9
2123 COMPANY COMM EQUIP	4.2	0	53.0	11.2
2124 GEN PURPOSE CMPTR	3.3	2	42.6	16.8
2211 ANALOG SW EQUIP	3.0	0	44.6	18.5
2212 DIGITAL SW EQUIP	10.2	2	26.8	7.0
2220 OPERATOR SYSTEMS	2.1	3	9.0	41.9
2231 RADIO SYSTEMS	5.1	2	47.2	10.0
2232 CIRCUIT ANALOG	3.0	-5	77.3	9.2
2232 CIRCUIT DDS	3.1	2	76.4	7.0
2232 CIRCUIT DIGITAL	6.0	0	45.4	9.1
2351 PUB TEL TERM EQUIP	5.3	5	63.0	6.0
2362 OTHER TERM EQUIP	3.7	-4	49.3	14.8
2411 POLE LINES	8.2	-43	73.3	8.5
2421 AERIAL CABLE MET	12.1	-59	44.4	9.5
2421 AERIAL CABLE NON MET	19.6	-29	22.1	5.5
2422 UNDGRD CABLE MET	14.2	-21	40.5	5.7
2422 UNDGRD CABLE NON MET	19.6	-17	20.2	4.9
2423 BURIED CABLE MET	14.4	-4	37.1	4.6
2423 BURIED CABLE NON MET	20.0	-4	15.6	4.4
2424 SUB CABLE MET	13.4	0	34.9	4.9
2424 SUB CABLE NON MET	30.0	0	0.0	3.3
2426 INTRA BLDG CA MET	11.1	-5	56.6	4.4
2426 INTRA BLDG NON MET	15.6	-5	25.3	5.1
2431 AERIAL WIRE	6.3	-79	60.1	18.9
2441 CONDUIT SYSTEMS	43.0	-7	20.5	2.0

The figures in Columns B, C, and D are percentages of gross book cost.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
U S WEST COMMUNICATIONS, INC. - UTAH

Effective January 1, 1994

Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Accumulated Depreciation (%) C	Remaining Life Rate (%) D=(100%-B-C)/A
2112 MOTOR VEHICLES	4.5	8	46.3	10.2
2114 SPEC PURPOSE VEHICLE	11.1	0	26.6	6.6
2115 GARAGE WORK EQUIP	10.9	0	26.0	6.8
2116 OTHER WORK EQUIP	11.1	0	20.6	7.2
2121 BUILDINGS	30.0	0	26.0	2.5
2122 FURNITURE	7.8	3	57.3	5.1
2123 OFFICE EQUIPMENT	4.3	0	40.1	13.9
2123 COMPANY COMM EQUIP	2.5	0	74.5	10.2
2124 GEN PURPOSE CMPTR	3.0	3	39.8	19.1
2211 ANALOG SW EQUIP	3.4	0	54.9	13.3
2212 DIGITAL SW EQUIP	9.7	3	25.6	7.4
2215 STEP BY STEP EQUIP [a]	---	-4	44.7	---
2220 OPERATOR SYSTEMS	2.8	0	89.4	3.8
2231 RADIO SYSTEMS	7.7	0	47.2	6.9
2232 CIRCUIT ANALOG	3.2	-5	79.4	8.0
2232 CIRCUIT DDS	3.6	0	56.8	12.0
2232 CIRCUIT DIGITAL	7.0	0	40.9	8.4
2351 PUB TEL TERM EQUIP	4.3	5	77.2	4.1
2362 OTHER TERM EQUIP	6.2	3	52.8	7.1
2411 POLE LINES	12.6	-43	54.9	7.0
2421 AERIAL CABLE MET	10.8	-31	47.5	7.7
2421 AERIAL CABLE NON MET	16.2	-25	5.7	7.4
2422 UNDGRD CABLE MET	12.9	-24	46.2	6.0
2422 UNDGRD CABLE NON MET	18.6	-19	12.9	5.7
2423 BURIED CABLE MET	15.4	-5	36.5	4.4
2423 BURIED CABLE NON MET	18.1	-5	15.9	4.9
2424 SUB CABLE MET	14.5	0	2.2	6.7
2424 SUB CABLE NON MET	30.0	0	0.0	3.3
2426 INTRA BLDG CA MET	9.3	-3	53.0	5.4
2426 INTRA BLDG NON MET	14.7	-3	7.7	6.5
2431 AERIAL WIRE	6.1	-25	61.8	10.4
2441 CONDUIT SYSTEMS	44.0	-7	19.9	2.0

The figures in Columns B, C, and D are percentages of gross book cost.

[a] The net service value for the Step-By-Step Account is to be amortized over a twenty-four month period ending December 31, 1995.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
U S WEST COMMUNICATIONS, INC. - WYOMING

Effective January 1, 1994

Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Accumulated Depreciation (%) C	Remaining Life Rate (%) D=(100%-B-C)/A
2112 MOTOR VEHICLES	3.5	8	78.1	4.0
2114 SPEC PURPOSE VEHICLE	10.8	0	28.7	6.6
2115 GARAGE WORK EQUIP	10.6	0	-38.6	13.1
2116 OTHER WORK EQUIP	11.1	1	19.5	7.2
2121 BUILDINGS	24.0	-9	32.5	3.2
2122 FURNITURE	---	0	100.0	5.0
2123 OFFICE EQUIPMENT	5.6	0	22.2	13.9
2123 COMPANY COMM EQUIP	2.8	-5	74.3	11.0
2124 GEN PURPOSE CMPTR	3.0	4	25.6	23.5
2211 ANALOG SW EQUIP	1.0	3	65.6	31.4
2212 DIGITAL SW EQUIP	10.9	3	18.6	7.2
2215 STEP BY STEP EQUIP @	---	-3	93.5	---
2220 OPERATOR SYSTEMS	8.0	0	0.0	12.5
2231 RADIO SYSTEMS	7.4	-5	42.7	8.4
2232 CIRCUIT ANALOG	4.1	-3	55.8	11.5
2232 CIRCUIT DDS	---	0	100.0	5.0
2232 CIRCUIT DIGITAL	7.1	2	35.2	8.8
2351 PUB TEL TERM EQUIP	2.2	5	88.3	3.0
2362 OTHER TERM EQUIP	4.6	3	66.0	6.7
2411 POLE LINES	9.6	-79	80.9	10.2
2421 AERIAL CABLE MET	10.9	-41	46.1	8.7
2421 AERIAL CABLE NON MET	15.2	-24	3.0	8.0
2422 UNDGRD CABLE MET	12.9	-30	41.6	6.9
2422 UNDGRD CABLE NON MET	19.2	-14	11.1	5.4
2423 BURIED CABLE MET	13.7	-4	39.0	4.7
2423 BURIED CABLE NON MET	19.6	-4	12.8	4.7
2424 SUB CABLE MET	14.6	0	67.7	2.2
2424 SUB CABLE NON MET	30.0	0	0.0	3.3
2426 INTRA BLDG CA MET	8.6	-5	55.3	5.8
2426 INTRA BLDG NON MET	17.0	-5	-132.4	14.0
2431 AERIAL WIRE	4.1	-55	58.7	23.5
2441 CONDUIT SYSTEMS	42.0	-7	22.2	2.0

The figures in Columns B, C, and D are percentages of gross book cost.

@ The net service value for the Step-By-Step Account is to be amortized over a twenty-four month period ending December 31, 1995.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

The Prescription of Revised Percentages of Depreciation Pursuant to the Communications Act of 1934, as amended for:

Bell Atlantic-District of Columbia, Inc.
Bell Atlantic-Virginia, Inc.
Bell Atlantic-West Virginia, Inc.
U S WEST Communications, Inc.

MEMORANDUM OPINION AND ORDER

Adopted: January 30, 1995; Released: January 31, 1995

By the Commission:

I. INTRODUCTION AND BACKGROUND

1. In this Memorandum Opinion and Order, we prescribe depreciation rates for four local exchange carriers ("LECs") that filed requests in 1994 for an annual update of their depreciation factors. We developed these depreciation rates after considering the carriers' requests, the comments of the interested parties, and additional information provided by the carriers in response to Commission inquiry.

2. This Commission prescribes depreciation rates for communications common carriers pursuant to Section 220(b) of the Communications Act of 1934, as amended.[1] Under Section 32.2000 of the Commission's Rules, depreciation rates are prescribed so as to depreciate fully the carriers' investments on a straight-line basis over the life of the associated plant.[2] In order to accomplish this, we use the following formula:

$$\text{depreciation rate} = \frac{100\% - \text{accumulated depreciation \%} - \text{future net salvage \%}}{\text{average remaining life}}$$

Both the average remaining life and future net salvage factors are based upon estimates,[3] which require periodic review to ensure their reasonableness.

3. In the *Depreciation Simplification Order*,[4] we adopted streamlined depreciation prescription procedures for the local exchange carriers ("LECs") regulated under our price cap incentive regulation plan. We determined that we would simplify the depreciation process by establishing ranges defined by specifying minimum and maximum amounts for two of the basic factors used to determine the depreciation rate formula (the future net salvage and the projection life estimates)[5] and allowing carriers to use estimates that are within the established ranges. There are two prerequisites for using the streamlined procedures. First, the basic factors underlying a LEC's current depreciation rate for an account must fall within the established ranges.[6] Second, the basic factors underlying new depreciation rates proposed by the LEC, must be consistent with its operations.[7] For those accounts that do not meet the criteria, carriers may update the rates in accordance with our current annual update procedures.[8]

4. In the *Second Report and Order* in the Depreciation\Simplification proceeding, released June 28, 1994, we approved ranges for 22 depreciation rate categories.[9] and indicated that carriers could use the new procedures in annual update filings. Four carriers filed for revised depreciation rates using our new streamlined procedures for some of these rate categories: U S WEST Communications, Inc. (for its Idaho, Iowa, Minnesota, Montana, and Oregon jurisdictions), Bell Atlantic-District of Columbia, Inc., Bell Atlantic-Virginia, Inc., and Bell Atlantic-West Virginia, Inc. For the remaining accounts, these carriers proposed revised

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[1] *See* 47 C.F.R. § 220(b).

[2] *See* 47 C.F.R. § 32.2000 (g)(1)(i).

[3] Pursuant to our rules, the depreciation rate for an account is a function of the average remaining life and future net salvage estimates and the accumulated depreciation ratio. The average remaining life is the estimated average of the future life expectancy of investment in a particular plant account. The future net salvage is the estimated amount that will be received as salvage for sale of retired plant less any estimated cost of removal. The accumulated depreciation ratio is the ratio of the accumulated depreciation to the related plant-in-service. Plant-in-service is the total amount invested in the plant and accumulated depreciation is the portion of that investment that has been depreciated.

[4] Simplification of the Depreciation Prescription Process, *Notice of Proposed Rulemaking*, 8 FCC Rcd 146 (1992) (*Notice*); Simplification of the Depreciation Process, *Report and Order*, 8 FCC Rcd 8025 (1993) (*Depreciation Simplification Order*); *petitions for reconsideration pending.*

[5] *Id.* at 8026.

[6] *Id.* at 8054.

[7] "Prescribing depreciation rates that allocate plant costs over the useful life of plant is central to our depreciation policy. Thus, a carrier should use the basic factors that reflect its company operations. *Id.*" at 8054.

The requirement that a new depreciation rate be consistent with carriers' operations is designed to assure that carriers do not arbitrarily select life and salvage estimates simply because they are within the prescribed ranges. Instead, carriers must select life and salvage factors within the range that are consistent with their operations. A carrier's factors are considered to be consistent with its operation if the proposed depreciation rate results in the straight line depreciation of the service value over the average remaining life of the plant. *See Supra*, note 2. Generally, such determinations are made by analyzing the mix of assets in the carrier's account, studying historical retirement data, and considering expected retirements and additions to the account based on the carrier's construction and modernization plans.

[8] *See* The Prescription of Revised Percentages of Depreciation Pursuant to Section 220(b) of the Communications Act, as amended for: AT&T-Long Lines Department, 96 FCC 2d 257 (1983) (*1983 Depreciation Order*). In that Order, we established streamlined study procedures that carriers could use at their discretion, to file for the annual update of rates between triennial reviews as long as they used the same equipment life and salvage estimates established in their most recent depreciation prescription order.

[9] Simplification of the Depreciation Prescription Process, *Second Report and Order*, 9 FCC Rcd 3206 (1994).

rates based upon the annual update procedures. The proposed rates were set forth in a *Public Notice* released September 2, 1994.[10]

II. PLEADINGS

5. The Virginia State Corporation Commission Staff ("Virginia Staff") filed comments and Bell Atlantic-Virginia filed reply comments. Although the Virginia Staff concurs with Bell Atlantic-Virginia's depreciation rate proposals, it expressed concern that the carriers may not have performed the necessary analysis to determine whether their depreciation rate proposals are consistent with their plant operations.[11] In its reply, Bell Atlantic-Virginia states that it followed the study guidelines issued by the FCC staff as well as the guidelines in the Commission's orders on depreciation simplification. On December 13, 1994, we contacted all four carriers, asking them to explain what they had done to ensure that their proposals for the range accounts were consistent with their operations. In its response, Bell Atlantic described the analysis it performed to determine that its proposals were consistent with company operations. U S WEST, however, stated that it had conducted studies supporting only five range accounts.[12]

III. DISCUSSION

6. These carriers' depreciation rate proposals are based on either of two review procedures: previously established annual update procedures or the newly established streamlined procedures. For most of the accounts, the carriers filed for changes in rates using the annual update procedures that have been in effect for many years. Under these procedures the carrier merely updates the rate calculations based upon the life and salvage estimates that underlie the most recent Commission depreciation prescription orders. We reviewed the carriers' proposals and determined that, for these accounts, the carriers computed the rates in accordance with the established procedures. No party objected to any of the rates. We, therefore, adopt them.

7. For the remainder of the accounts, the carriers proposed depreciation rates determined pursuant to our streamlined depreciation procedures. Using these procedures, the carriers are able to select life and salvage factors within the ranges established by the Commission, provided that the proposals are consistent with the carriers' operations. In its comments the Virginia Staff questioned whether the carriers had, in fact, made such determinations. Bell Atlantic stated that its proposals are consistent with company operations and it described the analysis performed to reach those conclusions. U S WEST, on the other hand, stated that the proposals for only five of the range accounts were supported by studies indicating consistency with company operations. Basically, the carriers examined how the accounts were affected by technological changes as well as their corporate strategies to reorganize and downsize their companies.

8. After reviewing the carriers' responses to our request, we conclude that Bell Atlantic, for all the accounts for which it requested the use of ranges, and U S WEST, for the five accounts previously noted, have considered the relevant factors and have made a good faith effort to propose life and salvage factors which are consistent with their operations. The staff has further determined that the carriers have selected life and salvage factors within the established ranges for the accounts indicated, and that they have computed rates consistent with these factors and the Commission's straight-line remaining life depreciation methods. Therefore, we adopt the depreciation rates for the remaining accounts. We are not adopting the proposed depreciation rates for the other range accounts of U S WEST. Rather, the revised rates were calculated using our current annual update procedures.

IV. CONCLUSION

9. Having considered the carriers' proposals, the responses to the Public Notice, and the Bureau's analyses and recommendations, we adopt the depreciation rates and effective dates listed in the Appendix.

V. ORDERING CLAUSES

10. ACCORDINGLY IT IS ORDERED, pursuant to Sections 4(i), 201-205 and 220(b) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 201-205 and 220(b), that the percentages of depreciation set forth in the Appendix to this Order ARE PRESCRIBED, effective on January 1, 1994.

11. IT IS FURTHER ORDERED, that this Order is effective upon release.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Appendix

[10] Comments Invited On Depreciation Rate Prescriptions Proposed For Domestic Telephone Carriers, 9 FCC Rcd 4808 (1994) (*Public Notice*).

[11] In addition, the Virginia Staff expressed concern with Bell Atlantic-Virginia's announcement of a one-time adjustment to its accumulated depreciation and the resulting depreciation rates for financial reporting purposes. This adjustment was recorded on the carrier's external financial books and not on the carrier's regulatory books. Therefore, these data do not impact the information required to determine regulatory depreciation rates that are approved by this Commission. Consideration of this adjustment is not relevant to issues raised in this proceeding and we will not consider it further at this time.

[12] These accounts are Analog Circuit, Underground Cable - Metallic, Underground Cable - Nonmetallic, Aerial Cable - Nonmetallic, and Buried Cable - Nonmetallic.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
BELL ATLANTIC - VIRGINIA, INC.

Effective January 1, 1994

Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Accumulated Depreciation (%) C	Remaining Life Rate (%) D=(100%-B-C)/A
2112 MOTOR VEHICLES	3.1	10	51.4	12.5
2115 GARAGE WORK EQUIPMENT	10.4	1	-3.3	9.8
2116 OTHER WORK EQUIPMENT	6.4	0	31.1	10.8
2121 BUILDINGS	29.0	2	21.3	2.6
2122 FURNITURE	8.3	0	18.8	9.8
2123 OFFICE SUPPORT EQUIP.	5.7	12	34.4	9.4
2123 COMPANY COMM. EQUIPMENT	6.8	8	40.6	7.6
2124 COMPUTERS	3.6	7	48.2	12.4
2211 ANALOG SWITCHING	1.8	3	52.7	24.6
2212 DIGITAL SWITCHING	10.2	1	28.4	6.9
2220 OPERATOR SYS - DIGITAL	9.6	0	16.3	8.7
2231 RADIO SYSTEMS	4.2	-5	24.2	19.2
2232 DIGITAL DATA SYSTEMS	3.1	0	30.3	22.5
2232 DIGITAL CIRCUIT EQUIP.	6.1	0	36.2	10.5
2232 ANALOG CIRCUIT EQUIP.	3.0	-5	63.8	13.7
2351 PUBLIC TELEPHONES	7.3	10	54.0	4.9
2362 OTHER TERMINAL EQPT	8.3	18	32.7	5.9
2411 POLES	16.3	-43	44.2	6.1
2421 AERIAL CABLE - METALLIC	12.4	-17	47.7	5.6
2421 AERIAL CABLE - NON MET	15.7	-25	16.7	6.9
2422 U.G. CA - METALLIC	13.6	2	44.4	3.9
2422 U.G. CA - NON METALLIC	15.5	-20	14.7	6.8
2423 BURIED CABLE-METALLIC	11.4	-4	42.5	5.4
2423 BURIED CABLE-NON MET	17.4	-10	21.9	5.1
2424 SUBMARINE CABLE	10.5	-8	58.3	4.7
2426 INTRABUILDING CABLE @	14.6	-19	43.1	5.2
2441 CONDUIT SYSTEMS	36.0	-10	21.0	2.5

The figures in Columns B, C, and D are percentages of gross book cost.

@ Extraordinary retirement amortization for the Intrabuilding Cable Account of $11,049 thousand annually over a four year period ending December 31, 1997.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
BELL ATLANTIC - WEST VIRGINIA, INC.

Effective January 1, 1994

Rate Category Description	Average Remaining Life	Future Net Salvage	Accumulated Depreciation	Remaining Life Rate
	(years) A	(%) B	(%) C	(%) D=(100%-B-C)/A
2112 MOTOR VEHICLES	3.1	10	59.0	10.0
2115 GARAGE WORK EQUIPMENT	6.3	0	23.7	12.1
2116 OTHER WORK EQUIPMENT	6.3	0	27.1	11.6
2121 BUILDINGS	27.0	4	25.1	2.6
2122 FURNITURE	8.3	0	34.7	7.9
2123 OFFICE SUPPORT EQUIP	4.7	0	50.7	10.5
2123 COMPANY COMM EQUIP	3.6	-5	71.5	9.3
2124 COMPUTERS	2.9	0	48.5	17.8
2212 DIGITAL SWITCHING	10.3	3	26.2	6.9
2220 OPER SYS DIGITAL	9.3	5	19.0	8.2
2231 RADIO SYSTEMS	3.5	-5	52.4	15.0
2232 DIGITAL DATA SYSTEMS	3.4	-5	37.2	19.9
2232 DIGITAL CIRCUIT EQUIP	6.0	1	41.0	9.7
2232 ANALOG CIRCUIT EQUIP	3.3	-5	45.8	17.9
2351 PUBLIC TELEPHONES	7.5	4	52.5	5.8
2362 OTHER TERM EQUIP	9.4	11	28.7	6.4
2411 POLES	15.2	-40	48.4	6.0
2421 AERIAL CABLE - METALLIC	12.4	-18	50.5	5.4
2421 AERIAL CABLE - NON MET	17.3	-25	15.6	6.3
2422 U.G. CABLE - METALLIC	15.4	-14	42.5	4.6
2422 U.G. CABLE - NON MET	13.7	-20	15.4	7.6
2423 BURIED CABLE - METALLIC	9.6	-7	57.5	5.2
2423 BURIED CABLE - NON MET	16.9	-10	35.2	4.4
2424 SUBMARINE CABLE	5.4	0	72.2	5.1
2426 INTRABUILDING CABLE	9.8	-21	32.5	9.0
2441 CONDUIT SYSTEMS	36.0	-10	27.5	2.3

The figures in Columns B, C, and D are percentages of gross book cost.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
BELL ATLANTIC - DISTRICT OF COLUMBIA, INC.

Effective January 1, 1994

Rate Category Description	Average Remaining Life	Future Net Salvage	Accumulated Depreciation	Remaining Life Rate
	(years) A	(%) B	(%) C	(%) D=(100%-B-C)/A
2112 MOTOR VEHICLES	2.6	10	64.1	10.0
2115 GARAGE WORK EQUIPMENT	6.5	0	28.8	11.0
2116 OTHER WORK EQUIPMENT	6.4	0	38.9	9.5
2121 BUILDINGS	27.0	10	13.4	2.8
2122 FURNITURE	8.2	19	39.0	5.1
2123 OFFICE SUPPORT EQUIP.	5.8	15	39.0	7.9
2123 COMPANY COMM. EQUIPMENT	4.4	-5	40.1	14.8
2124 COMPUTERS	3.0	10	46.4	14.5
2211 ANALOG SWITCHING	2.3	0	64.1	15.6
2212 DIGITAL SWITCHING	9.9	3	30.2	6.7
2212 CUST.PREM.SWITCHING	4.5	25	34.3	9.0
2220 OP SYS - DIGITAL SW.	6.8	3	36.4	8.9
2231 RADIO SYSTEMS	4.0	-5	48.7	14.1
2232 DIGITAL DATA SYSTEMS	6.5	-4	49.1	8.4
2232 DIGITAL CIRCUIT EQUIP.	6.9	1	35.9	9.1
2232 ANALOG CIRCUIT EQUIP.	5.7	0	30.8	12.1
2351 PUBLIC TELEPHONE EQUIP.	3.8	0	62.1	10.0
2362 OTHER TERMINAL EQPT	3.5	-5	59.9	12.9
2411 POLES	18.7	-115	97.1	6.3
2421 AERIAL CABLE - METALLIC	11.6	-8	59.1	4.2
2421 AERIAL CABLE - NON MET.	18.1	-8	23.9	4.6
2422 U.G. CABLE - METALLIC	13.7	-11	55.4	4.1
2422 U.G. CABLE - NON MET.	13.8	-20	30.5	6.5
2423 BURIED CABLE	15.5	-7	43.6	4.1
2424 SUBMARINE CABLE	4.5	-5	94.0	2.4
2426 INTRABUILDING CABLE	11.5	-12	53.8	5.1
2441 CONDUIT SYSTEMS	28.0	-10	42.6	2.4

The figures in Columns B, C, and D are percentages of gross book cost.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
U S WEST COMMUNICATIONS, INC. - IDAHO

Effective January 1, 1994

Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Accumulated Depreciation (%) C	Remaining Life Rate (%) D=(100%-B-C)/A
2112 MOTOR VEHICLES	3.8	11	53.1	9.4
2114 SPEC PURPOSE VEHICLES	13.0	12	16.2	5.5
2115 GARAGE WORK EQUIP	13.5	12	23.0	4.8
2116 OTHER WORK EQUIP	11.9	12	31.1	4.8
2121 BUILDINGS	25.0	-1	29.7	2.9
2122 FURNITURE	9.7	1	-9.1	11.1
2123 OFFICE EQUIPMENT	5.3	0	16.6	15.7
2123 COMPANY COMM EQUIP	4.8	1	51.8	9.8
2124 GEN PURPOSE CMPTR	2.8	3	47.6	17.6
2211 ANALOG SW EQUIP	3.0	2	57.2	13.6
2212 DIGITAL SW EQUIP	10.6	3	23.8	6.9
2220 OPERATOR SYSTEMS	---	0	100.0	5.0
2231 RADIO SYSTEMS	8.2	-5	40.2	7.9
2232 CIRCUIT ANALOG	3.5	-5	46.6	16.7
2232 CIRCUIT DDS	5.1	-4	38.7	12.8
2232 CIRCUIT DIGITAL	6.9	3	34.0	9.1
2351 PUB TEL TERM EQUIP	3.3	5	86.3	2.6
2362 OTHER TERM EQUIP	4.5	1	40.1	13.1
2411 POLE LINES	10.7	-56	77.3	7.4
2421 AERIAL CABLE MET	10.3	-36	51.5	8.2
2421 AERIAL CABLE NON MET	13.5	-25	10.6	8.5
2422 UNDGRD CABLE MET	13.1	-20	40.5	6.1
2422 UNDGRD CABLE NON MET	17.5	-20	12.0	6.2
2423 BURIED CABLE MET	15.4	-7	36.8	4.6
2423 BURIED CABLE NON MET	17.7	-10	18.2	5.2
2424 SUB CABLE MET	17.7	-5	54.0	2.9
2424 SUB CABLE NON MET	25.0	-5	0.0	4.2
2426 INTRA BLDG CA MET	11.7	-1	50.0	4.4
2426 INTRA BLDG CABLE NON MET	10.0	-14	0.2	11.4
2431 AERIAL WIRE	4.9	-123	79.1	29.4
2441 CONDUIT SYSTEMS	44.0	-5	21.1	1.9

The figures in Columns B, C, and D are percentages of gross book cost.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
U S WEST COMMUNICATIONS, INC. - IOWA

Effective January 1, 1994

Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Accumulated Depreciation (%) C	Remaining Life Rate (%) D=(100%-B-C)/A
2112 MOTOR VEHICLES	5.0	11	45.7	8.7
2114 SPEC PURPOSE VEHICLES	15.0	10	0.0	6.0
2115 GARAGE WORK EQUIP	9.8	0	-49.7	15.3
2116 OTHER WORK EQUIP	9.9	10	42.6	4.8
2121 BUILDINGS	27.0	7	21.9	2.6
2122 FURNITURE	---	1	100.0	5.0
2123 OFFICE EQUIPMENT	5.1	0	70.8	5.7
2123 COMPANY COMM EQUIP	4.1	0	40.0	14.6
2124 GEN PURPOSE CMPTR	3.1	5	44.2	16.4
2211 ANALOG SW EQUIP	4.2	3	57.9	9.3
2212 DIGITAL SW EQUIP	10.9	4	24.0	6.6
2215 STEP BY STEP SW EQUIP	1.0	-1	91.8	9.2
2220 OPERATOR SYSTEMS	1.2	5	91.8	2.7
2231 RADIO SYSTEMS	4.3	-4	70.2	7.9
2232 CIRCUIT ANALOG	3.5	-5	60.9	12.6
2232 CIRCUIT DDS	5.4	0	27.8	13.4
2232 CIRCUIT DIGITAL	6.5	0	39.7	9.3
2351 PUB TEL TERM EQUIP	5.8	5	52.8	7.3
2362 OTHER TERM EQUIP	4.7	4	41.3	11.6
2411 POLE LINES	9.0	-64	144.8	2.1
2421 AERIAL CABLE MET	8.2	-24	81.2	5.2
2421 AERIAL CABLE NON MET	13.1	-26	-0.1	9.6
2422 UNDGRD CABLE MET	12.0	-30	62.3	5.6
2422 UNDGRD CABLE NON MET	15.0	-20	22.7	6.5
2423 BURIED CABLE MET	13.1	-13	57.3	4.3
2423 BURIED CABLE NON MET	17.0	-10	15.1	5.6
2424 SUB CABLE MET	2.9	-5	92.3	4.4
2424 SUB CABLE NON MET	18.1	-5	3.2	5.6
2426 INTRA BLDG CA MET	9.7	-21	81.9	4.0
2426 INTRA BLDG CABLE NON MET	14.8	-16	28.2	5.9
2431 AERIAL WIRE	3.1	-31	86.8	14.3
2441 CONDUIT SYSTEMS	33.0	-18	54.2	1.9

The figures in Columns B, C, and D are percentages of gross book cost.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
U S WEST COMMUNICATIONS, INC. - MINNESOTA

Effective January 1, 1994

Rate Category Description		Average Remaining Life (years) A	Future Net Salvage (%) B	Accumulated Depreciation (%) C	Remaining Life Rate (%) D=(100%-B-C)/A
2112 MOTOR VEHICLES		5.1	9	43.4	9.3
2114 SPEC PURPOSE VEHICLES		6.8	10	63.1	4.0
2115 GARAGE WORK EQUIP		9.6	0	-100.8	20.9
2116 OTHER WORK EQUIP		11.2	10	35.0	4.9
2121 BUILDINGS		28.0	6	17.3	2.7
2122 FURNITURE		---	1	100.0	5.0
2123 OFFICE EQUIPMENT		7.8	0	13.2	11.1
2123 COMPANY COMM EQUIP		4.6	0	36.2	13.9
2124 GEN PURPOSE CMPTR		3.1	5	49.8	14.6
2211 ANALOG SW EQUIP		3.7	2	52.5	12.3
2212 DIGITAL SW EQUIP		10.6	3	24.1	6.9
2215 STEP BY STEP SW EQUIP	@	---	-1	65.9	---
2215 CROSSBAR SW EQUIP	@	---	-1	57.1	---
2220 OPERATOR SYSTEMS		5.2	5	89.7	1.0
2231 RADIO SYSTEMS		5.5	-5	56.0	8.9
2232 CIRCUIT ANALOG		3.0	-5	60.8	14.7
2232 CIRCUIT DDS		6.2	0	5.0	15.3
2232 CIRCUIT DIGITAL		7.0	0	39.8	8.6
2351 PUB TEL TERM EQUIP		5.6	5	68.5	4.7
2362 OTHER TERM EQUIP		4.0	7	48.4	11.2
2411 POLE LINES		6.4	-60	134.5	4.0
2421 AERIAL CABLE MET		9.6	-24	68.0	5.8
2421 AERIAL CABLE NON MET		11.0	-25	-11.4	12.4
2422 UNDGRD CABLE MET		13.0	-20	48.0	5.5
2422 UNDGRD CABLE NON MET		15.0	-20	17.1	6.9
2423 BURIED CABLE MET		13.3	-13	47.6	4.9
2423 BURIED CABLE NON MET		21.0	-11	14.8	4.6
2424 SUB CABLE MET		7.3	-5	74.7	4.2
2424 SUB CABLE NON MET		18.5	-5	15.4	4.8
2426 INTRA BLDG CA MET		10.0	-14	78.1	3.6
2426 INTRA BLDG CABLE NON MET		17.3	-11	22.7	5.1
2431 AERIAL WIRE		3.7	-29	68.8	16.3
2441 CONDUIT SYSTEMS		37.0	-18	36.9	2.2

The figures in Columns B, C, and D are percentages of gross book cost.

@ The amortization amounts for the Crossbar Switching and Step-By-Step Switching accounts ordered in FCC 93-40, released January 15, 1993, are continued.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
U S WEST COMMUNICATIONS, INC. - MONTANA

Effective January 1, 1994

Rate Category Description		Average Remaining Life (years) A	Future Net Salvage (%) B	Accumulated Depreciation (%) C	Remaining Life Rate (%) D=(100%-B-C)/A
2112 MOTOR VEHICLES		4.2	10	53.0	8.8
2114 SPEC PURPOSE VEHICLES		11.6	13	28.3	5.1
2115 GARAGE WORK EQUIP		15.1	13	-19.6	7.1
2116 OTHER WORK EQUIP		13.3	13	2.5	6.4
2121 BUILDINGS		19.3	-10	35.8	3.8
2122 FURNITURE		11.9	7	-10.4	8.7
2123 OFFICE EQUIPMENT		5.0	7	18.9	14.8
2123 COMPANY COMM EQUIP		3.9	1	65.4	8.6
2124 GEN PURPOSE CMPTR		2.2	5	70.6	11.1
2211 ANALOG SW EQUIP		3.1	2	65.7	10.4
2212 DIGITAL SW EQUIP		10.2	3	24.2	7.1
2215 STEP BY STEP SW EQUIP	a	---	-5	70.9	---
2215 CROSSBAR SW EQUIP	a	---	-4	29.6	---
2220 OPERATOR SYSTEMS		4.8	0	-5.5	22.0
2231 RADIO SYSTEMS		8.7	-3	30.7	8.3
2232 CIRCUIT ANALOG		3.3	-5	50.2	16.6
2232 CIRCUIT DDS		4.1	15	36.6	11.8
2232 CIRCUIT DIGITAL		6.6	2	33.2	9.8
2351 PUB TEL TERM EQUIP		3.8	5	83.6	3.0
2362 OTHER TERM EQUIP		4.2	9	41.4	11.8
2411 POLE LINES		13.9	-64	90.0	5.3
2421 AERIAL CABLE MET		12.4	-42	48.4	7.5
2421 AERIAL CABLE NON MET		12.8	-25	4.6	9.4
2422 UNDGRD CABLE MET		12.7	-30	49.5	6.3
2422 UNDGRD CABLE NON MET		17.7	-20	12.2	6.1
2423 BURIED CABLE MET		15.4	-3	36.0	4.4
2423 BURIED CABLE NON MET		19.3	-10	10.8	5.1
2424 SUB CABLE MET		13.1	-5	55.6	3.8
2424 SUB CABLE NON MET		25.0	-5	0.0	4.2
2426 INTRA BLDG CA MET		13.1	-9	51.7	4.4
2426 INTRA BLDG CABLE NON MET		9.7	-10	20.2	9.3
2431 AERIAL WIRE		4.5	-100	132.1	15.1
2441 CONDUIT SYSTEMS		37.0	-15	30.5	2.3

The figures in Columns B, C, and D are percentages of gross book cost.

a The amortization amounts for the Crossbar Switching and Step-By-Step Switching accounts ordered in FCC 94-13, released January 31, 1994, are continued.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
U S WEST COMMUNICATIONS, INC. - OREGON

Effective January 1, 1994

Rate Category Description	Average Remaining Life	Future Net Salvage	Accumulated Depreciation	Remaining Life Rate
	(years) A	(%) B	(%) C	(%) D=(100%-B-C)/A
2112 MOTOR VEHICLES	5.6	15	37.1	8.6
2114 SPEC PURPOSE VEHICLES	7.6	10	39.6	6.6
2115 GARAGE WORK EQUIP	7.7	10	55.4	4.5
2116 OTHER WORK EQUIP	9.5	10	49.7	4.2
2121 BUILDINGS	27.0	1	27.3	2.7
2122 FURNITURE	8.4	18	69.9	1.4
2123 OFFICE EQUIPMENT	7.8	9	-7.8	12.7
2123 COMPANY COMM EQUIP	3.9	0	39.8	15.4
2124 GEN PURPOSE CMPTR	2.9	9	53.5	12.9
2211 ANALOG SW EQUIP	3.6	2	48.4	13.8
2212 DIGITAL SW EQUIP	10.4	8	24.3	6.5
2220 OPERATOR SYSTEMS	5.9	5	44.9	8.5
2231 RADIO SYSTEMS	7.9	-5	38.9	8.4
2232 CIRCUIT ANALOG	2.7	-5	51.9	19.7
2232 CIRCUIT DDS	5.3	0	7.8	17.4
2232 CIRCUIT DIGITAL	6.6	3	32.0	9.8
2351 PUB TEL TERM EQUIP	7.1	6	66.2	3.9
2362 OTHER TERM EQUIP	5.5	0	29.6	12.8
2411 POLE LINES	12.6	-57	62.2	7.5
2421 AERIAL CABLE MET	11.9	-16	45.9	5.9
2421 AERIAL CABLE NON MET	13.1	-25	10.8	8.7
2422 UNDGRD CABLE MET	12.5	-6	42.8	5.1
2422 UNDGRD CABLE NON MET	20.0	-16	17.1	4.9
2423 BURIED CABLE MET	14.6	-9	38.0	4.9
2423 BURIED CABLE NON MET	16.8	-9	17.2	5.5
2424 SUB CABLE MET	11.0	-4	79.7	2.2
2424 SUB CABLE NON MET	15.6	-4	10.7	6.0
2426 INTRA BLDG CA MET	9.8	-18	67.2	5.2
2426 INTRA BLDG CABLE NON MET	16.7	-25	23.9	6.1
2431 AERIAL WIRE	6.1	-52	97.9	8.9
2441 CONDUIT SYSTEMS	37.0	-7	25.5	2.2

The figures in Columns B, C, and D are percentages of gross book cost.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 1, 1995

FEE DECISIONS OF THE MANAGING DIRECTOR AVAILABLE TO THE PUBLIC

The Managing Director is responsible for fee decisions in response to requests for waiver or deferral of fees as well as other pleadings associated with the fee collection process. On a monthly basis, a public notice is released and the entire text of these fee decisions is published in the FCC record.

The decisions are placed in general docket 86-285 and are available for public inspection. A copy of the decision is also placed in the appropriate docket, if one exists.

The following Managing Director fee decisions are released for public information:

Charter Communications, L.P. - Request for refund of regulatory fees for a cable television service at St. Louis, Missouri - **Denied** (January 20, 1995).

Crewboats, Inc. - Request for refund of two filing fees submitted in connection with requests for exemption from the requirements of 47 U.S.C. Section 351 - **Granted** (January 24, 1995).

Curators of the University of Missouri - Petition for declaratory ruling and deferment of regulatory fees for a commercial television station at Columbia, Missouri - **Granted** (January 20, 1995).

D'Amico Brothers Broadcasting - Petition for reconsideration of a decision to dismiss an application to modify a low power television license at Vista, California - **Denied** (January 27, 1995).

Family Broadcasting Enterprises - Request for waiver of regulatory fees for a UHF station at Rocky Mount, North Carolina - **Granted** (February 10, 1995).

FM Translators - Request for refund of regulatory fees for stations K22CG, W248AB, and W259AB - **Granted** (February 13, 1995).

FM 104.9 - Request for refund of a hearing fee for a new FM station at Clemson, South Carolina - **Granted** (February 22, 1995).

Golden Rain Foundation - Request for waiver and refund of regulatory fees for a cable television station at Laguna Hills, California - **Granted** (February 3, 1995).

Kusk, Inc. - Request for reduction and partial refund of regulatory fees assessed for a VHF station at Prescott, Arizona - **Granted** (February 10, 1995).

Long Family Partnership - Request for determination of regulatory fees for a UHF station at Hickory, North Carolina - **Granted** (February 10, 1995).

McGraw-Hill, Inc. - Request for refund of filing fees submitted in connection with applications filed for non-commercial land mobile radio communication licenses in the reallocated 220-222 MHz frequency band - **Granted** (January 27, 1995).

Meredith, Stephen O. - Request for refund of regulatory fees for a new commercial FM station at Audubon, Iowa - **Granted** (January 20, 1995).

Mid-State Television, Inc. - Request for reduction and deferral of regulatory fees for a UHF station at Mansfield, Ohio - **Granted** (February 10, 1995).

Organ Television Association - Request for waiver of regulatory fees for a television translator station at Organ, New Mexico - **Granted** (February 3, 1995).

Papenfuss, Jerry - Request for refund of a hearing fee for a new FM station at Perham, Minnesota - **Granted** (January 24, 1995).

Pike Communications, Inc. - Request for refund of a hearing fee for a new FM station at Piketon, Ohio - **Granted** (January 24, 1995).

Prairie Broadcasting Company, Inc. - Request for refund of a hearing fee for a new FM station at Perham, Minnesota - **Granted** (January 24, 1995).

Public Telephone Corporation - Request for refund of regulatory fees for a pay telephone service at Fort Wayne, Indiana - **Granted** (January 29, 1995).

Radio and Television Commission of SBC - Request for refund of regulatory fees for a station at Fort Worth, Texas - **Granted** (January 29, 1995).

Russian River Vintage Broadcasting - Petition for reconsideration of the decision by the Managing Director for Operations in reference to a new FM radio broadcast station at Sebastopol, California - **Granted** (November 14, 1994).

Stephens County Broadcasting Company - Request for determination of regulatory fees for station WNEG-TV and WNEG-TV at Toccoa, Georgia - **Granted** (January 20, 1995).

NOTE: ANY QUESTIONS REGARDING THIS REPORT SHOULD BE DIRECTED TO THE PREPARER, CLAUDETTE PRIDE, CHIEF, FEE SECTION ON (202)418-1995.

FEDERAL COMMUNICATIONS COMMISSION

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JAN 20 1995

John R. McFerron
Director of Regulatory Compliance
Charter Communications, L.P.
12444 Powerscourt Drive
St. Louis, Mo. 63131-3660

Re: Cable Regulatory Fee
Fee Control # 9408168835574011

Dear Mr. McFerron:

This is in reply to your request, dated September 13, 1994, for a refund of your cable television service regulatory fee. You state that when you acquired your cable system from the McDonald Group, you paid the regulatory fee to insure that you were in compliance with the Commission's rules. You further state that since the McDonald Group owned the system on December 31, 1993, that it is liable for the regulatory fees for FY94, and that the McDonald Group notified you of their intention to file a Form 159 with the appropriate payment.

A search of the Commission's records discloses, however, that no Form 159 from the "McDonald Group" had been filed or a fee received. Moreover, in Implementation of Section 9 of the Communications Act, 9 FCC Rcd 5333 (1994) the Commission addressed the procedures for payment of regulatory fees when there is a transfer of control. It held that the "party holding the license on the date the fees are due will be the party responsible for its payment." Moreover, the Commission declined to pro rate the fee among the parties, asserting that the negotiations between the parties to a transfer or assignment would ordinarily have included consideration for expenses related to the payment of regulatory fees. 9 FCC Rcd 5346 n. 14.

Thus, as the owner of the cable system during the relevant time period, you are responsible for the payment of the regulatory fees, and your request for a refund will be denied.

If you have any questions concerning the payment of the regulatory fee, please call the Chief, Fee Section at (202) 418-1995.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JAN 1995

Mr. Patrick S. Pescay
Crewboats, Inc.
P.O. Box 148
Chalmette, Louisiana 70044-0148

Dear Mr. Pescay:

This will respond to your request for refund of two filing fees submitted on behalf of Crewboats, Inc. ("Crewboats"), the operator of small passenger vessels that operate within 100-200 nautical miles from land. You state that the filing fees were submitted in connection with Crewboats' requests for exemption from the requirements of 47 U.S.C. Section 351 for two of its vessels.

The Commission has generally exempted from the requirements of Part II of Title III small passenger vessels that operate within 100-200 nautical miles from land. See 47 C.F.R. Section 80.905; see also Amendment of Maritime Service Rules (Part 80) to Revise the General Exemption for Small Passenger Vessels Operated on Domestic Voyages, 7 FCC Rcd 4582 (1992). Crewboats thus was not required to file the exemption requests. By letter dated September 13, 1993, the Aviation and Marine Branch of the Wireless Telecommunications Bureau so informed Crewboats of the applicable exemption, as well as requirements of section 80.905.

Under the circumstances, since Crewboats was not required to file the exemption application, refund of the filing fees is warranted. See 47 C.F.R. §1.1111(a). Accordingly, your request is granted. A check, made payable to the maker of the original check and drawn in the amount of $210.00, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 418-1995.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JAN 2 0 1995

Kathryn R. Schmeltzer
Fisher, Wayland, Cooper, Leader & Zaragoza
2001 Pennsylvania Ave., N.W.
Washington, D.C. 20006

Dear Ms. Schmeltzer:

This is in response to the Petition for Declaratory Ruling and for Deferment of Payment of Regulatory Fees, filed July 26, 1994 on behalf of the Curators of the University of Missouri. In the petition you requested that the Commission exempt the Curators as a government entity from payment of the regulatory fees.

The Curators are the licensees of Commercial Television Station KOMU-TV, Columbia, Missouri, and Low Power Television Station K07SD, Rolla, Missouri, which rebroadcasts programming from KOMU-TV. The University was established by an act of the State legislature, is supported in part by state funds, the Curators are state employees who oversee the operation of the University, and the University is subject to governmental procedural requirements.

Congress exempted governmental entities from the regulatory fees. 47 U.S.C. § 159(h). In Implementation of Section 9 of the Communications Act, 9 FCC Rcd 5333, 5339-40 § 14 (19940 we found that government entities included "any state, possession, city, county, town, village, municipal corporation, or similar political organization or subpart controlled by publicly elected officials . . ." We further found that the exemption was broad enough to include commercial ventures by government entities. 9 FCC Rcd at 5340 ¶¶ 15-16. Thus, the Curators are a governmental entity exempt from payment of the regulatory fees.

If you have any questions concerning the payment of the regulatory fee, please call the Chief, Fee Section at (202) 418-1995.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JAN 2 7 '95

Joseph E. Dunne III, Esq.
May & Dunne
1000 Thomas Jefferson Street, N.W.
Suite 520
Washington, D.C. 20007

Dear Mr. Dunne:

This will respond to the petition for reconsideration, filed on behalf of D'Amico Brothers Broadcasting ("DBB"), which seeks further review of the Billings and Collections Branch's decision to dismiss DBB's application to modify its low power television license. DBB's application was dismissed because it had failed to include FCC Form 155, the fee processing form, with its modification application and filing fee.

DBB concedes that it had failed to include FCC Form 155 with its submission, but nevertheless contends that its application should be reinstated nunc pro tunc. Specifically, DBB claims that during the applicable window for filing applications for new, and major modifications to existing, low power stations, the lockbox bank received approximately 2,000 applications. Given the numerous filings, DBB asserts, that despite its omission of the appropriate form, the processing staff presumably could have been able to make the initial determination of the amount of fee and proper fee code, and thus could have expeditiously processed its application. Moreover, DBB maintains that public interest considerations dictate reinstatement of its application. DBB believes that its application, if granted, will enable it to bring local programming to a larger, as well as an underserved, population. In this connection, DBB represents that denial of its application may jeopardize its current authorization, which has already been extended, and may preclude it from obtaining a site, given the rising area rental costs. Finally, DBB argues that reinstatement of its application is consistent with Review of the Commission's Rules Governing the Low Power Television Service, 9 FCC Rcd 2555 (1994), where the Commission adopted a more flexible "substantially complete" standard for acceptance of new and major modifications to low power television applications.

Commission filing fees must be accompanied by FCC Form 155. Applications that are submitted without FCC Form 155 are subject to dismissal. See 47 C.F.R. Section 1.1107(a)(2);. see also Establishment of a Fee program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1989, 5 FCC Rcd 3558, 3569-70 (1990)("Because the Fee Form is essential to the efficient processing of fees, the failure to submit the form will result in the dismissal of the underlying application. Similarly, if the fee associated with the code(s) entered on the form do not match the fee paid, the submission will be dismissed"). In LEOSAT Corporation, 8 FCC Rcd 668 (1993), the Commission dismissed a low-Earth orbit satellite

application for failure to include an FCC Form 155 with its submissions. The Commission rejected arguments that inclusion of the FCC Form 155 was a mere technicality. The Commission stated:

> [T]he Form 155 requirement is of such importance to the administration of the Commission's fee program that it is a prerequisite to acceptance of an application. The purpose of the Form 155 requirement is not . . . to enable the efficient processing of applications but to enable the efficient and cost effective processing of fees. With the expected three-fold increase in feeable applications occasioned by the new Schedule of Charges, the Commission sought to utilize the most cost-efficient method of cash management in collecting fees and to ensure the rapid deposit of funds. The new Form 155 requirement was a critical and necessary part of achieving these objectives, as it would make it possible for the lockbox bank to make the initial determination of whether the correct fee had been paid without reading the underlying materials . . . .

Id. at 671. Moreover, the Commission dismissed those contentions that the cut-off notice was deficient, in that it did not specifically address the procedural requirement that obligated applicants to also file FCC Form 155. Id. at 669. The Commission stated that this procedural requirement was explicitly set forth in section 1.1107(a)(2), and thus prospective applicants were afforded sufficient notice. Id. Here, the Public Notice specifically directed applicants to submit the appropriate $425.00 fee accompanied by FCC Form 155.

It also should be noted that the Commission's recent adoption of the "substantially complete" standard for processing low power television applications, issued after the applicable window-filing, was not retroactive. More importantly, even with the Commission's more liberal processing standard, applicants must submit the appropriate fee and form, or suffer the consequences of dismissal for failure to do so.

Finally, DBB's public interest arguments unfortunately do not outweigh the Commission's overriding interest in maintaining the integrity and efficiency of the fee collection program through strict enforcement of this procedural requirement. As the Commission stated in LEOSAT Corporation, "Such claims could be made by virtually any applicant and, if accepted, would vitiate the Form 155 requirement." Id. at 671.

Based on the foregoing, reinstatement of DBB's application is not warranted. Accordingly, DBB's petition for reconsideration is denied.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

FEB 1 . 1995

Dr. Robert J. Pelletier
Family Broadcasting Enterprises
126 North Washington St.
P.O. Box 4750
Rocky Mount, NC 27803-0750

Re: Family Broadcasting Enterprises
WRMY-TV
Rocky Mount, North Carolina

Dear Dr. Pelletier:

This is in response to your request for waiver of the Fiscal Year 1994 regulatory fee for Family Broadcasting Enterprises (Family), licensee of UHF Station WRMY-TV, Rocky Mount, North Carolina.

You contend that although WRMY-TV is located in the Raleigh-Durham, North Carolina ADI (Area of Dominant Influence) Market, it provides a city grade signal only to the city of license, Rocky Mount, which is a community with a population of less than 50,000. Thus, you maintain that Family should not be required to pay the regulatory fee ordinarily due from UHF stations serving Raleigh-Durham. Further, you contend that Family cannot afford to pay the regulatory fee currently assessed for WRMY-TV.

Our review of the record shows that WRMY-TV is assigned to the Raleigh-Durham Television Market, the 32nd largest television market. However, WRMY-TV's predicted Grade B contour does not reach Raleigh-Durham or any other major metropolitan area. Broadcasting & Cable Yearbook 1994, p. c-202, lists Rocky Mount as a Non-ADI market, i.e., a single-county market whose "preponderance of viewing is not to the home market station." WRMY-TV's home county, Edgecombe County, is assigned to the Raleigh-Durham ADI solely because the preponderance of its TV households view the programming of stations serving the Raleigh-Durham area. Although Arbitron does not maintain market data for your station, according to Arbitron, there are 75,200 TV households in Edgecombe, Nash and Wilson counties which comprise WRMY-TV's service area, which is smaller than the number of TV households located in the top 100 markets.

Under these circumstances, we will regard Rocky Mount as a non-top 100 market. Therefore, WRMY-TV is assessed a regulatory fee for Fiscal Year 1994 of $4,000, which constitutes the fee for a

"remaining market" UHF station. Absent significant changes in population or coverage area, WRMY-TV will be considered as a remaining market station in succeeding years.

Payment of the Fiscal Year 1994 regulatory fee for WRMY-TV is now due. Family should file a Form 159 and a copy of this letter together with a check for WRMY-TV's regulatory fee of $4,000 within 30 days from the date of this letter. A copy of this letter should also be maintained and included with any future correspondence concerning the imposition of the regulatory fee for WRMY-TV.

If you have any questions concerning payment of WRMY-TV's regulatory fee, please call the Chief, Fee Section at (202) 418-1995.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

FEB 1 [illegible] 1995

Mr. Dan J. Alpert, Esq.
1250 Connecticut Ave. N.W.
Washington, D.C. 20036-2603

Re: FM Translators
Fee Control # 9408158835821006

Dear Mr. Alpert:

This is in response to your request for a refund of the payment of the regulatory fee submitted in the above referenced matter.

Your request is granted. We have reviewed the facts surrounding your filing and have concluded that a refund is warranted pursuant to Section 1.1159 of the Commission's rules. 47 C.F.R. § 1.1159. The subsection checked below is specifically applicable to your request.

__X__ When no regulatory fee is required or an excessive fee has been paid (§ 1.1159(a)(1)).

_____ When the Commission adopts new rules that nullify a license or other authorization, or a new law or treaty renders a license of other authorization useless (§ 1.1159(a)(2)(i)).

_____ When a licensee in the private radio service surrenders the license or other authorization subject to a fee payment to the Commission (§ 1.1159(a)(2)(ii)).

_____ When the Commission declines to grant an application submitted with a regulatory fee payment (§ 1.1159(a)(2)(iii).

A check made payable to the maker of the original check in the amount of $100 will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 418-1995.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

FEB 2 2 1996

Lawrence J. Bernard, Esq.
2000 L Street, N.W.
Suite 504
Washington, D.C. 20036

Re: FM 104.9
New FM Station
Clemson, South Carolina
Fee Control # 9107178170292002

Dear Mr. Bernard:

This is in response to your request for refund of the fee submitted in the above-referenced matter.

Your request is granted. We have reviewed the facts surrounding your filing and have concluded that a refund is warranted pursuant to Section 1.1111 of the Commission's rules. 47 C.F.R. §1.1111. The subsection checked below is specifically applicable to your request.

_____ No fee is required for the above-referenced submission (§ 1.1111(a)(1)).

_____ An insufficient fee has been submitted with the application/filing (§1.1111(a)(2)).

_____ The applicant cannot fulfill the prescribed age requirement (§1.1111(a)(4)).

_____ The Commission had adopted a new rule that has nullified the application after its acceptance for filing (§1.1111(a)(4)).

_____ A new law or treaty has rendered useless a grant or other positive disposition of the application (§1.1111(a)(4)).

_____ The application was not timely filed in accordance with the filing window as established by the Commission (§1.1111(a)(6)).

_____ In the case of a broadcast applicant, the application was granted without being designated for hearing (§1.1111(b)(1)).

__X__ In the case of a broadcast applicant, the application was dismissed prior to designation for hearing or in the order designating the case for hearing (§1.1111(b)(2)).

_____ In the case of a broadcast applicant, the application was dismissed for failure to file a Notice of Appearance (§1.1111(b)(2)).

_____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding to file a Notice of Appearance and the application was immediately grantable (§1.1111(b)(3)).

_____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding who filed a Notice of Appearance and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)).

_____ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for the dismissal of all but the above-referenced application, and the application was immediately grantable (§1.1111(b)(4)).

_____ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for dismissal of all but the above-referenced application and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)(4)).

A check, made payable to the maker of the original check and drawn in the amount of $6,760, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 418-1995.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

FEB 3 1995

The Golden Rain Foundation
c/o Professional Community Management, Inc.
P.O. Box 2220
Laguna Hills, CA 92654-2220

Attn: Tanya C. McElhaney

Re: The Golden Rain Foundation
Laguna Hills, California
Fee Control # 9408118835320004

Dear Ms. McElhaney:

This is in response to your request for waiver and refund of regulatory fees, dated August 5, 1994, filed on behalf of The Golden Rain Foundation (Golden Rain).

Golden Rain is registered with the State of California as a non-profit corporation. Golden Rain maintains that it owns and operates a cable television system which serves the residents of the Rossmoor Leisure World Senior Citizens Retirement Community in Laguna Hills on a nonprofit basis.

In establishing the regulatory fee program Congress provided an exemption from the fee requirement for nonprofit entities. 47 U.S.C. § 159(h). Thus, the Commission's rules exempt nonprofit entities "possessing nonprofit, tax exempt status under section 501 of the Internal Revenue Code" from the regulatory fee requirement. 47 CFR § 1.1161(c). In addition, the Commission, as contemplated by Congress, has provided for waiver of regulatory fees on a case-by-case basis in those instances in which "waiver would promote the public interest." 47 CFR § 1.1165.

Golden Rain has not presented a Tax Exempt Determination Letter from the Internal Revenue Service establishing its nonprofit status, and thus it does not qualify under the Commission's rules for an exemption from its regulatory fees. However, section 9(h) exempted all nonprofit entities from the regulatory fee. 47 U.S.C. § 159(h). Thus, Golden Rain, as a nonprofit corporation, is entitled to an exemption from paying the regulatory fee, and, accordingly, the fee will be waived and the fee previously tendered will be refunded. A copy of this letter should be included in any future correspondence with respect to imposition of regulatory fees.

A check made payable to the maker of the original check in the amount of $4,783.36 will be sent to you at the earliest practicable time. If you have any further questions concerning the regulatory fees, please call the Chief, Fee Section at (202) 418-1995.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

FEB 1 0 1995

Ms. Nancy A. Ory, Esquire
Leventhal, Senter & Lerman
2000 K Street, N.W.
Suite 600
Washington, D.C. 20006-1809

Re: KUSK, Inc.
KUSK-TV
Prescott, Arizona
Fee Control #9408018835114003
#9408308835156002

Dear Ms. Ory:

This is in response to your request, filed on behalf of KUSK, Inc. (KUSK), for reduction and partial refund of the Fiscal Year 1994 regulatory fee assessed for VHF Station KUSK-TV, Prescott, Arizona.

You state that, although KUSK-TV is located in the Phoenix, Arizona ADI (Area of Dominant Influence) Market, Prescott is located 95 miles from Phoenix, it does not serve Phoenix, and it cannot afford to pay the same annual regulatory fee as VHF network affiliates serving the Phoenix metropolitan area. You request therefore that the regulatory fee payable by KUSK be reduced to $5000, which would be the regulatory fee for VHF stations located outside of the top 100 markets.

Our review of the record shows that KUSK-TV is within the Phoenix, Arizona Television Market, which constitutes the 21st largest television market. However, KUSK-TV's predicted Grade B contour does not reach Phoenix or any other major metropolitan area. Broadcasting & Cable Yearbook 1994, p. c-202, lists Prescott as a Non-ADI market, i.e., a single-county market whose "preponderance of viewing is not to the home market station." KUSK-TV's home county, Yavapai County, is assigned to the Phoenix ADI solely because the preponderance of its TV households view the programming of Phoenix Stations. According to Arbitron, there are 46,100 TV households in KUSK-TV's service area, which is smaller than the number of TV households in the top 100 markets.

Under these circumstances, we will regard Prescott as a non-top 100 market. Therefore, KUSK is assessed a regulatory fee for FY 1994 of $5,000, the fee for a remaining market VHF Station. Absent significant changes in population or coverage area, KUSK-TV will be considered as a "remaining market" station in

succeeding years. A copy of this letter should be maintained and included with any future correspondence concerning the imposition of the regulatory fee for station KUSK-TV.

Accordingly, your request is granted. KUSK has paid $16,000 in two installments, the FY 1994 regulatory fee for a VHF Station serving the Phoenix, Arizona market. Thus, it is entitled to a refund of $11,000. A check, made payable to the maker of the original check and drawn in the amount of $11,000, will be sent to you at the earliest practicable time.

If you have any questions concerning this refund, please call the Chief, Fee Section at (202) 418-1995.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

FEB 1 0 1995

Mr. Bradford D. Carey, Esquire
Hardy & Carey
111 Veterans Boulevard
Metairie, LA 70005

Re: Long Family Partnership
WHKY-TV
Hickory, North Carolina
Fee Control # 9408028835125003

Dear Mr. Carey:

This is in response to your request for a determination concerning the applicable Fiscal Year 1994 regulatory fee for Long Family Partnership (Long), licensee of UHF Station WHKY-TV, Hickory, North Carolina.

You state that although WHKY-TV is assigned by Arbitron to the Charlotte, North Carolina ADI (Area of Dominant Influence) Market, its Grade B signal does not reach the City of Charlotte. Charlotte is among the largest fifty television markets and as such is subject to a fee of $9,600. You contend that it is inequitable to require Long to pay the regulatory fee assessed for stations operating in the Charlotte market because WHKY-TV is licensed to Hickory, which is a community with a population of 20,727, and does not serve Charlotte. You urge that Long should be assessed the regulatory fee for a UHF station serving a non-top 100 or "remaining market." You have submitted a check for $9,600, the fee applicable for a UHF Station serving markets 26-50, and request that the Commission refund the difference between $9,600 and $4,000, which would be the fee for a UHF Station serving a remaining market.

Our review of the record discloses that Arbitron has included WHKY-TV in the Charlotte, North Carolina Market, the 30th largest market. WHKY-TV's predicted Grade B Contour, however, does not cover the City of Charlotte or any other major metropolitan area. Moreover, Broadcasting & Cable Yearbook 1994, p. c-202, lists Hickory as a Non-ADI market, i.e., a single-county market whose "preponderance of viewing is not to the home market station." WHKY-TV's home county, Catawba County, is assigned to the Charlotte ADI because the preponderance of its TV households view the programming of stations licensed to Charlotte rather than to stations licensed to communities within the county. Moreover, according to Arbitron, there are 114,300 TV households in WHKY-

TV's service area, which is a fewer number of TV households than any of the top 100 markets.

Under these circumstances, we will regard Hickory as a non-top 100 market station and, therefore, assess WHKY-TV a regulatory fee for FY 1994 of $4,000, the fee assessable for a remaining market UHF station. Thus, Long is entitled to a refund of $5,600.

Absent significant changes in signal coverage or population density, WHKY-TV will be treated as a remaining market station for regulatory fee purposes in succeeding years. A copy of this letter should be maintained and submitted with any future correspondence with the Commission concerning the imposition of the regulatory fee for station WHKY-TV.

A check, made payable to the maker of the original check in the amount of $5,600, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please call the Chief, Fee Section at (202) 418-1995.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JAN 27 1993

Mr. G. Gordon Long
Director, IS&T Telecommunications
McGraw-Hill, Inc.
Princeton Road, N1
Hightstown, New Jersey 08520

Dear Mr. Long:

This will respond to your request for refund of the filing fees submitted in connection with the applications of McGraw-Hill, Inc.

You state that McGraw-Hill had filed applications for non-commercial land mobile radio communication licenses in the recently reallocated 220-222 MHz frequency band. Given the Commission's adoption of more stringent construction and operational standards which significantly altered the non-commercial licensing requirements, McGraw-Hill has opted to withdraw its applications, and has sought a refund of its filing fees.

It would appear that, under the circumstances, refund of the fee payment is warranted. See 47 C.F.R. §§1.1111(a)(4). The Commission recognized that some non-commercial applicants would withdraw their applications because they would not be able to meet the new licensing requirements, and explicitly stated that under such circumstances fee refunds would be appropriate. See Memorandum Opinion and Order (PR Docket No. 89-552), 7 FCC Rcd 4484, n. 66 (1992).

Accordingly, your request is granted. A check, made payable to the maker of the original check and drawn in the amount of $12,250.00, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 418-1995.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JAN 2 [illegible]

Gary S. Smithwick
Smithwick & Belendiuk
1990 M Street
Washington, D.C. 20036

Re: Stephen O. Meredith
KSOM(FM)
Audubon, Iowa
Fee Control # 9408128835338007

Dear Mr. Smithwick

This is in response to your request for a refund of the regulatory fee payment submitted in the above referenced matter.

Your request is granted. We have reviewed the facts surrounding your filing and have concluded that a refund is warranted pursuant to Section 1.1159 of the Commission's rules. 47 C.F.R. § 1.1159. The subsection checked below is specifically applicable to your request.

__X__ When no regulatory fee is required or an excessive fee has been paid (§ 1.1159(a)(1)).

_____ When the Commission adopts new rules that nullify a license or other authorization, or a new law or treaty renders a license of other authorization useless (§ 1.1159(a)(2)(i)).

_____ When a licensee in the private radio service surrenders the license or other authorization subject to a fee payment to the Commission (§ 1.1159(a)(2)(ii)).

_____ When the Commission declines to grant an application submitted with a regulatory fee payment (§ 1.1159(a)(2)(iii).

A check made payable to the maker of the original check in the amount of $500.00 will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 418-1995.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

FEB [illegible]

Ms. Anne Goodwin Crump, Esquire
Fletcher, Heald & Hildreth
1300 North 17th St.
Rosslyn, VA 22209

Re: Mid-State Television, Inc.
WMFD-TV
Mansfield, Ohio

Dear Ms. Crump:

This is in response to your request for reduction and deferral of the Fiscal Year 1994 regulatory fee for Mid-State Television, Inc., licensee of UHF Station WMFD-TV, Mansfield, Ohio.

You state that although WMFD-TV is assigned by Arbitron to the Cleveland, Ohio ADI (Area of Dominant Influence) Market, its Grade B signal does not reach Cleveland. Thus, you contend that it would be inequitable to require Mid-State to pay the regulatory fee for a Cleveland station, and that because it serves Mansfield, a community with a population of approximately 55,000, it should be assessed the regulatory fee for a UHF station serving a non-top 100 or "remaining market." You further request deferral of any fee payment pending action on your request for reduction.

Your request for deferral and reduction is granted. Our review of the record discloses that Arbitron has included WMFD-TV in the Cleveland, Ohio Market, which constitutes the 12th largest television market. WMFD-TV's Grade B Contour, however, does not reach Cleveland or any other major metropolitan area. Broadcasting & Cable Yearbook 1994, p. c-202, lists Mansfield as a Non-ADI market, i.e., a single-county market whose "preponderance of viewing is not to the home market station." WMFD-TV's home county, Richland County, is assigned to the Cleveland ADI solely because the preponderance of its TV households view the programming of Cleveland stations. Moreover, according to Arbitron, there are 47,600 TV households in WMFD-TV's service area, which is smaller than the number of TV households in the top 100 markets.

Under these circumstances, we will regard Mansfield as a non-top 100 market, and, therefore, WMFD-TV is assessed a regulatory fee for Fiscal Year 1994 of $4,000, which reflects the fee for a "remaining market" UHF station. Absent significant changes in population or coverage area, WMFD-TV will be considered as a remaining market station in succeeding years.

Mid-State should file a completed FCC Form 159 and a copy of this letter together with a check in the amount of $4,000 for its Fiscal Year 1994 regulatory fee within 30 days from the date of this letter. A copy of this letter should also be maintained and included with any future correspondence concerning the imposition of the regulatory fee for WMFD-TV.

If you have any questions concerning this matter, please call the Chief, Fee Section at (202) 418-1995.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

FEB 3 1995

Mr. Norman K. Remley
Secretary
Organ Television Association
P.O. Box 236
Organ, NM 88052

Re: VHF Translator K06EF

Dear Mr. Remley:

This is in response to your letter requesting a waiver of the regulatory fee for television translator station K06EF operated by the Organ Television Association.

You maintain that the television association is a non-profit entity supported solely from the money donated by the residents who originally constructed the station, and its only current income is the interest earned on its bank balance.

In establishing the regulatory fee program, Congress provided an exemption from the fee requirement for nonprofit entities. 47 U.S.C. § 159(h). Thus, the Commission's rules exempt nonprofit entities "possessing nonprofit, tax exempt status under section 501 of the Internal Revenue Code" from the regulatory fee requirement. 47 CFR § 1.1161(c). In addition, the Commission, as contemplated by Congress, has provided for waiver of regulatory fees on a case-by-case basis in those instances in which "waiver would promote the public interest." 47 CFR § 1.1165.

Organ Television Association has not presented a Tax Exempt Determination Letter from the Internal Revenue Service establishing its nonprofit status, and thus it does not qualify under the Commission's rules for an exemption from its regulatory fees. However, section 9(h) exempted all nonprofit entities from payment of the regulatory fee. 47 U.S.C. § 159(h). Your representations establish that the Organ Television Association is a nonprofit entity within the meaning of section 9(h) of the Communications Act and that it is entitled to an exemption from the Commission's regulatory fee requirement for its translator station.

A copy of this letter should be included in any future correspondence with respect to the imposition of regulatory fees. If you have any questions about the exemption, please call the Chief, Fee Section at (202) 418-1995.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JAN 24 1995

Todd M. Stansbury, Esq.
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

Re: Jerry Papenfuss
New FM Station
Perham, Minnesota
Fee Control # 9209098170380001

Dear Mr. Stansbury:

This is in response to your request for refund of the fee submitted in the above-referenced matter.

Your request is granted. We have reviewed the facts surrounding your filing and have concluded that a refund is warranted pursuant to Section 1.1111 of the Commission's rules. 47 C.F.R. §1.1111. The subsection checked below is specifically applicable to your request.

_____ No fee is required for the above-referenced submission (§ 1.1111(a)(1)).

_____ An insufficient fee has been submitted with the application/filing (§1.1111(a)(2)).

_____ The applicant cannot fulfill the prescribed age requirement (§1.1111(a)(4)).

_____ The Commission had adopted a new rule that has nullified the application after its acceptance for filing (§1.1111(a)(4)).

_____ A new law or treaty has rendered useless a grant or other positive disposition of the application (§1.1111(a)(4)).

_____ The application was not timely filed in accordance with the filing window as established by the Commission (§1.1111(a)(6)).

_____ In the case of a broadcast applicant, the application was granted without being designated for hearing (§1.1111(b)(1)).

_____ In the case of a broadcast applicant, the application was dismissed prior to designation for hearing or in the order designating the case for hearing (§1.1111(b)(2)).

_____ In the case of a broadcast applicant, the application was dismissed for failure to file a Notice of Appearance (§1.1111(b)(2)).

_____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding to file a Notice of Appearance and the application was immediately grantable (§1.1111(b)(3)).

_____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding who filed a Notice of Appearance and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)).

__X__ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for the dismissal of the above-referenced application, and the other application was immediately grantable (§1.1111(b)(4)).

_____ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for dismissal of all but the above-referenced application and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)(4)).

A check, made payable to the maker of the original check and drawn in the amount of $6,760, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 418-1995.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JAN 2 4 1995

David G. O'Neil, Esq.
Rini & Coran, P.C.
1350 Connecticut Avenue, N.W.
Suite 900
Washington, D.C. 20036

Re: Pike Communications, Inc.
New FM Station
Piketon, Ohio
Fee Control # 9107168170289002

Dear Mr. O'Neil:

This is in response to your request for refund of the fee submitted in the above-referenced matter.

Your request is granted. We have reviewed the facts surrounding your filing and have concluded that a refund is warranted pursuant to Section 1.1111 of the Commission's rules. 47 C.F.R. §1.1111. The subsection checked below is specifically applicable to your request.

_____ No fee is required for the above-referenced submission (§ 1.1111(a)(1)).

_____ An insufficient fee has been submitted with the application/filing (§1.1111(a)(2)).

_____ The applicant cannot fulfill the prescribed age requirement (§1.1111(a)(4)).

_____ The Commission had adopted a new rule that has nullified the application after its acceptance for filing (§1.1111(a)(4)).

_____ A new law or treaty has rendered useless a grant or other positive disposition of the application (§1.1111(a)(4)).

_____ The application was not timely filed in accordance with the filing window as established by the Commission (§1.1111(a)(6)).

_____ In the case of a broadcast applicant, the application was granted without being designated for hearing (§1.1111(b)(1)).

___X___ In the case of a broadcast applicant, the application was dismissed prior to designation for hearing or in the order designating the case for hearing (§1.1111(b)(2)).

_____ In the case of a broadcast applicant, the application was dismissed for failure to file a Notice of Appearance (§1.1111(b)(2)).

_____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding to file a Notice of Appearance and the application was immediately grantable (§1.1111(b)(3)).

_____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding who filed a Notice of Appearance and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)).

_____ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for the dismissal of the above-referenced application, and the other application was immediately grantable (§1.1111(b)(4)).

_____ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for dismissal of all but the above-referenced application and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)(4)).

A check, made payable to the maker of the original check and drawn in the amount of $6,760, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 418-1995.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JAN 2 4 1995

John S. Neely, Esq.
Miller & Miller
1990 M Street, N.W.
Suite 760
Washington, D.C. 20036

Re: Prairie Broadcasting Company, Inc.
New FM Station
Perham, Minnesota
Fee Control # 9209118170382002

Dear Mr. Neely:

This is in response to your request for refund of the fee submitted in the above-referenced matter.

Your request is granted. We have reviewed the facts surrounding your filing and have concluded that a refund is warranted pursuant to Section 1.1111 of the Commission's rules. 47 C.F.R. §1.1111. The subsection checked below is specifically applicable to your request.

_____ No fee is required for the above-referenced submission (§ 1.1111(a)(1)).

_____ An insufficient fee has been submitted with the application/filing (§1.1111(a)(2)).

_____ The applicant cannot fulfill the prescribed age requirement (§1.1111(a)(4)).

_____ The Commission had adopted a new rule that has nullified the application after its acceptance for filing (§1.1111(a)(4)).

_____ A new law or treaty has rendered useless a grant or other positive disposition of the application (§1.1111(a)(4)).

_____ The application was not timely filed in accordance with the filing window as established by the Commission (§1.1111(a)(6)).

_____ In the case of a broadcast applicant, the application was granted without being designated for hearing (§1.1111(b)(1)).

_____ In the case of a broadcast applicant, the application was dismissed prior to designation for hearing or in the order designating the case for hearing (§1.1111(b)(2)).

_____ In the case of a broadcast applicant, the application was dismissed for failure to file a Notice of Appearance (§1.1111(b)(2)).

_____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding to file a Notice of Appearance and the application was immediately grantable (§1.1111(b)(3)).

_____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding who filed a Notice of Appearance and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)).

__X__ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for the dismissal of the above-referenced application, and the other application was immediately grantable (§1.1111(b)(4)).

_____ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for dismissal of all but the above-referenced application and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)(4)).

A check, made payable to the maker of the original check and drawn in the amount of $6,760, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 418-1995.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JAN 2 9 1995

Thomas J. Martin
President
Public Telephone Corporation
3206 Mallard Cove Lane
Fort Wayne, Indiana 46804-2883

Re: Public Telephone Corporation
Fort Wayne, Indiana
Fee Control # 9408228835032011

Dear Mr. Martin:

This is in response to your request for a refund of the regulatory fee payment submitted in the above referenced matter.

Your request is granted. We have reviewed the facts surrounding your filing and have concluded that a refund is warranted pursuant to Section 1.1159 of the Commission's rules. 47 C.F.R. § 1.1159. The subsection checked below is specifically applicable to your request.

__X__ When no regulatory fee is required or an excessive fee has been paid (§ 1.1159(a)(1)).

_____ When the Commission adopts new rules that nullify a license or other authorization, or a new law or treaty renders a license of other authorization useless (§ 1.1159(a)(2)(i)).

_____ When a licensee in the private radio service surrenders the license or other authorization subject to a fee payment to the Commission (§ 1.1159(a)(2)(ii)).

_____ When the Commission declines to grant an application submitted with a regulatory fee payment (§ 1.1159(a)(2)(iii).

A check made payable to the maker of the original check in the amount of $37.08 will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 418-1995.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JAN 2 9 1995

Glenn W. McEowen
Radio and Television Commission of the SBC
6350 West Freeway
Fort Worth, Texas 76150

Re: Earth Station regulatory fees
Fee Control # 9409098835466006

Dear Mr. McEowen

This is in response to your request for a refund of the regulatory fee payment submitted in the above referenced matter.

Your request is granted. We have reviewed the facts surrounding your filing and have concluded that a refund is warranted pursuant to Section 1.1159 of the Commission's rules. 47 C.F.R. § 1.1159. The subsection checked below is specifically applicable to your request.

__X__ When no regulatory fee is required or an excessive fee has been paid (§ 1.1159(a)(1)).

_____ When the Commission adopts new rules that nullify a license or other authorization, or a new law or treaty renders a license of other authorization useless (§ 1.1159(a)(2)(i)).

_____ When a licensee in the private radio service surrenders the license or other authorization subject to a fee payment to the Commission (§ 1.1159(a)(2)(ii)).

_____ When the Commission declines to grant an application submitted with a regulatory fee payment (§ 1.1159(a)(2)(iii).

A check made payable to the maker of the original check in the amount of $1882 will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 418-1995.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

NOV 1 4 1994

Benjamin Perez, Esq.
Abacus Communications Company
1801 Columbia Road, N.W.
Suite 101
Washington, D.C. 20009-2031

Dear Mr. Perez:

This is in response to your petition for reconsideration of the decision by the Associate Managing Director for Operations denying a request for hearing fee refund submitted on behalf of Russian River Vintage Broadcasting (Russian), applicant for a new FM radio broadcast station at Sebastopol, California.

You state that Russian tendered its hearing fee after it had been dismissed from the Sebastopol proceeding in the Hearing Designation Order, 5 FCC Rcd 3927 (MMB 1990)(HDO), for failure to provide accurate geographical coordinates for its tower site. You also state that Russian never was allowed to participate in the hearing, and request therefore that Russian's fee be returned.

Section 1.1111(a)(1) of the rules, which was in effect at the time Russian tendered its fee, provided that an applicant's fee may be refunded where there is no fee required for the application or filing. 47 C.F.R. § 1.1111(a)(1). It appears that Russian submitted its hearing fee when none was otherwise required pending reconsideration of its dismissal in the HDO for reasons unrelated to fee matters. If Russian's application had been dismissed by the Fee Staff, Russian would have been required to tender its fee pending reconsideration. See 47 C.F.R. § 1.1116(b). However, this was not the case here, and because Russian was not required to submit any fee pending reconsideration, Russian's fee may be returned.

A check, made payable to the maker of the original check and drawn in the amount of $6,760, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 418-1995.

Sincerely,

Andrew S. Fishel
Managing Director

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JAN 20 1995

Mr. Roy E. Gaines
President/General Manager
Stephens County Broadcasting Company
100 Blvd.
P.O. Box 907
Toccoa, Georgia 30577

Dear Mr. Gaines:

This is in response to your request for a determination of the regulatory fee amount due from Stephens County Broadcasting Company (Stephens) for its stations WNEG-AM and WNEG-TV, Toccoa, Georgia.

You contend that Stephens' before tax profits may be insufficient to cover the amounts due for its stations. Further, you contend that the fee payment required for WNEG-TV is excessive because its designation as a station operating in the Greenville-Spartanburg-Asheville/Anderson/Toccoa television market (the 35th major television market) does not accurately reflect the location and population of its viewing households.

In support of your contention that WNEG-TV should not be treated as within the 35th largest television market for regulatory fee purposes, you state that WNEG-TV's predicted Grade B contour does not reach the metropolitan areas of Greenville, Spartanburg or Asheville. Further, our review has disclosed that Stephens County, where WNEG-TV is located, is assigned to the 35th market because a preponderance of its TV households view the programming of stations licensed to Greenville, Spartanburg or Asheville rather than that of stations licensed to communities within the county. See Broadcasting and Cable Yearbook 1994, p. c-202. Also, Arbitron estimates that WNEG-TV's service area covers 182,400 TV households, a number well below the TV households within the 35th television market and below the TV households within any of the top 100 television markets.

We agree that the $9,600 fee assessed UHF stations within the Greenville, Spartanburg, Asheville/Anderson/Toccoa market should not apply to WNEG-TV. Rather, we will treat WNEG-TV as serving a market outside the top 100 markets, and, therefore, we conclude that the fee due for WNEG-TV should be $4,000, the regulatory fee that Congress enacted for UHF stations operating in remaining markets. See 47 U.S.C. § 159(g); see also 47 CFR § 1.1153. Absent significant changes in population or signal coverage,

WNEG-TV should pay the fee for UHF stations operating in a remaining market in future years.

Stephens should submit a regulatory fee of $4,000 for WNEG-TV in addition to the full regulatory fee due for WNEG-AM within thirty days from the date of this letter. The payment should be accompanied by a completed Remittance Advice Form (FCC Form 159) and a copy of this letter.

Finally, we note that a 25 percent penalty is generally required for failure to make timely payment of a regulatory fee, notwithstanding the pendency of a request for waiver or reduction of the fee. 47 CFR § 1.1.1164(c). In this instance, we will not assess a penalty charge against Stephens because the regulatory fee rules were only recently adopted when its fee payment became due and because we are satisfied that you have made a good faith effort to comply with the regulatory fee requirements.

If you have any questions concerning the annual regulatory fees, please call the Chief, Fee Section at (202) 418-1995.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
Operations

PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
1919 M STREET N.W.
WASHINGTON, D.C. 20554

DA 94-1161

News media information 202/632-5050. Recorded listing of releases and texts 202/632-0002.

Released: October 19, 1994

MDS REFERENCE ROOM RELOCATED

The MDS Reference Room provides public access to all applications, authorizations and related documents pertaining to the Multipoint Distribution Service. The MDS Reference Room has been relocated to Room 207 in the Commission's offices at 2033 M Street, N.W., Washington, D.C. 20554.

The MDS Reference Room is open to the public only from 1:00 p.m. to 4:00 p.m., Monday through Friday, excluding legal holidays, due to staff shortages.

A coin-operated duplicating machine for public use will be installed in Room 207 in the near future. Copies of MDS records can also be obtained by contacting directly International Transcription Service, Inc., whose corporate address is: 2100 M Street, N.W., Suite 140, Washington, D.C. 20037, Telephone No. (202)857-3800.

File requests when the MDS Reference Room is closed will be honored only on an emergency basis by contacting the MDS Section of the Video Services Division (Room 600) at Telephone No. (202) 416-1106 or Barbara A. Kreisman, Chief of the Video Services Division at Telephone No. (202) 418-1600.

Thank you for your cooperation.

- F C C -

DA 94-1165

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applictions of

BLINN COLLEGE — File No. BPLIF-911219DH

Bryan, TX

BUFFALO INDEPENDENT SCHOOL DISTRICT — File No. BPLIF-911230DI

Bremond, TX

For Construction Permit and License
in the Instructional Television
Fixed Service on Channels D1, D2,
D3, and D4.

ERRATUM

Released: October 21, 1994

The Memorandum Opinion and Order (FCC 94-135) released July 7, 1994, concerning the above-captioned proceeding is corrected by adding to the Commission vote line "Commissioners Ness and Chong not participating."

FEDERAL COMMUNICATIONS COMMISSION

PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
1919 M STREET N.W.
WASHINGTON, D.C. 20554

News media information 202/418-0500 Recorded listing of releases and texts 202/418-2222.

DA 94-1482 Released: December 15, 1994

COMMISSION SEEKS COMMENT ON TELEPORT PETITION FOR DECLARATORY RULING ON PACIFIC BELL AREA CODE NUMBERING PLAN
IAD File No. 94-104

Comments Due: January 30, 1995
Reply Comments Due: February 27, 1995

On December 5, 1994, Teleport Communications Group, Inc., (Petitioner), filed a Petition for Declaratory Ruling on the overlay numbering plan proposed by Pacific Bell in the Los Angeles area. The Petitioner seeks relief from a proposed plan filed with the California Public Utilities Commission by Pacific Bell, in its capacity as Code Administrator. The Petitioner requests that the Commission find that "the Pacific Bell Plan...would discriminate against broad numbers of customers and have anticompetitive consequences for competitors...in violation of the Communications Act." The Petitioner also asks the Commission to establish "neutral, nondiscriminatory policies" governing area code relief plans.

Interested parties may file comments on the Petition not later than January 30, 1995. Reply comments should be filed not later than February 27, 1995. All comments should include the above Industry Analysis Division (IAD) File Number shown above. The full text of the Petition from Teleport, as well as other documents filed with the Commission on telephone numbering issues, are available for inspection and duplication between the hours of 9:00 a.m. and 4:00 p.m. in the Public Reference Room of the Common Carrier Bureau, Industry Analysis Division, located at 1250 23rd Street, N.W., Washington, D.C. Copies may be obtained from International Transcription Service (ITS) by calling (202) 857-3800.

An original and four copies of all comments and replies should be filed in accordance with Section 1.51(c) of the Commission's Rules, 47 C.F.R. §1.51(c). In addition, one copy of the comments should be filed with ITS, the Commission's duplicating contractor, at its office at 2100 M Street, N.W., Suite 140, Washington D.C. 20037. In addition two copies should be filed with the Chief, Industry Analysis Division, Common Carrier Bureau, Room 10, Plaza Level, 1250 23rd Street, N.W., Washington, D.C. 20554.

For further information, contact Mary Green, Industry Analysis Division, (202) 418-0940.

- FCC -

DA 94-1235

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)
	)
BBC LICENSE	)
SUBSIDIARY L.P.	)
	)
and	)
	)
SF BROADCASTING OF	)
GREEN BAY INC.	)
	)
For Assignment of Licenses for	)
WLUK-TV, Green Bay, Wisconsin,	)
W40AN, Escanaba, Michigan	)

ORDER

Adopted: November 4, 1994 **Released:** November 7, 1994

1. This action, by the Chief, Video Services Division of the Mass Media Bureau, responds to the October 19, 1994 request of the National Broadcasting Company, Inc. (NBC) that the Commission not accept for filing the above-captioned applications. Alternatively, NBC contends that if the applications are accepted, the deadline for filing petitions to deny should be extended thirty days beyond the date on which the final document required to complete the application is filed. SF Broadcasting of Wisconsin, Inc. (SF Wisconsin), the parent of the proposed assignee, SF Broadcasting of Green Bay, Inc. (SF Green Bay), responded to NBC's requests on October 21, 1994. NBC replied on October 24, 1994.[1] For the reasons discussed below, we deny NBC's primary request, defer action on its alternative request, and accept the SF Green Bay applications for filing.

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[1] On October 31, 1994, SF Green Bay filed an amendment to its application and NBC, on November 3, 1994, responded to that amendment, arguing, in essence, that the amendment does not cure the purportedly deficient application.

2. On October 14, 1994, SF Green Bay, identified as the designated successor to the rights of SF Broadcasting of Green Bay L.L.C, requested dismissal of previously filed applications, FCC File Nos. BALCT-940811KJ and BALTT-940811KK, which sought consent to the assignment of WLUK-TV and W40AN to SF Broadcasting of Green Bay L.L.C. Concurrently, SF Green Bay filed the above-captioned applications to supersede those earlier filed. The new applications, SF Green Bay noted, indicate that the stations' assignee is a corporation rather than a limited liability company (LLC), the treatment of which the Commission has yet to determine. According to SF Green Bay, its two owners, Savoy Stations, Inc., a subsidiary of Savoy Pictures Entertainment, Inc. (collectively, Savoy), and FTS Investments, Inc., a subsidiary of Fox Television Stations, Inc. (collectively, Fox), substituted the LLC with the corporate form in order to prevent "further delays." Accompanying the new applications were the Asset Purchase Agreement, governing the purchase of the stations and their related assets, and the Subscription and Stockholders Agreement, governing the rights of and relations among SF Wisconsin, Savoy, and Fox.

3. Before the Commission could place the applications on public notice in due course, NBC filed its October 19, 1994 request that the Commission not accept the applications. NBC urges that the Commission reject the new SF Green Bay applications as "incomplete" on two broad grounds: (1) those applications do not enable the Commission to determine whether the interests of Fox are attributable; and (2) they do not enable the Commission to determine whether the licensee complies with the alien ownership provisions of Section 310(b) of the Communications Act. The alleged incompleteness of the applications, NBC intimates, can be remedied by the applicants' submission of several documents[2] and of further details relating to the assignees' compliance with Section 310(b) of the Act, the provision governing alien ownership of licensees.[3]

4. SF Wisconsin responded to NBC's request on October 21, 1994, maintaining that the new applications are complete and "fully compl[y] with all pertinent FCC standards for acceptance for filing." Specifically, SF Wisconsin describes the status of the documents

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[2] Those documents, according to NBC, include: the operating agreement of SF Broadcasting L.L.C.; the management and employment agreements referenced in the Subscription and Stockholders Agreement; any agreement involving the additional $5.5 million to be paid in by Fox; and "[a]ny other document executed by Fox" that limits SF Green Bay's management of the stations.

[3] NBC contends that the applicants must: (1) reconcile Fox's "significant alien ownership" with the proposed assignee's certification of compliance with Section 310(b); (2) provide "[d]ocumentation" as to the calculation of the alien ownership of Savoy; and (3) supplement the application's Exhibit 3 with further details of alien financial assistance.

sought by NBC,[4] appends a copy of one such document[5], and asserts that the alien ownership arguments "do not relate to the completeness" of the applications.

5. This is not a proceeding to determine the grantability of SF Green Bay's assignment applications, but rather one to assess whether those applications should be accepted for filing. Pursuant to Section 73.3564 of the Commission's Rules, an application will be accepted for filing if it is found to be "complete or substantially complete." It is established that an application may be acceptable for filing as substantially complete and yet not demonstrate the qualifications required for a grant. Peoria Community Broadcasters, Inc., 79 F.C.C. 2d 311, 325 (1980); KALE, Inc., 56 F.C.C. 2d 1033 (1975); Trustees of Dartmouth College, 29 R.R. 2d 59 (1973); Central Florida Enterprises, Inc., 22 F.C.C. 2d 260 (1970). Here, SF Green Bay has responded to all of the items on the FCC Form 314 assignment application. And NBC has cited no instance of SF Green Bay's failure to respond to a question on the application form. Instead, NBC's allegations involve issues related to SF Green Bay's legal qualifications, such as attribution and alien ownership, matters which pertain to grantability rather than to mere acceptability of the application. That an application "might easily contain a serious violation of Commission rules" does not undermine its "substantially complete" status. James River Broadcasting Corporation v. FCC, 399 F.2d 581, 583 (D.C. Cir. 1968). In view of the foregoing, we conclude that the above-captioned applications contain information sufficiently responsive to the Form 314 items so as to constitute "substantially complete" applications for purposes of acceptability within the meaning of Section 73.3564.

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[4] SF Wisconsin argues that because SF Broadcasting L.L.C. will be "an inactive entity remaining in existence solely for the purpose of assigning the station purchase agreements," documents relating to those structures are "irrelevant" to the new applications. In an October 31, 1994 amendment, see Note 1, supra, SF Green Bay indicates that SF Broadcasting L.L.C. has been dissolved. As to agreements relating to Fox's $5.5 million contribution, SF Wisconsin asserts that they are all set forth in the already filed Subscription and Stockholders Agreement. Finally, "[t]here are," according to SF Wisconsin, "no other documents that relate to the rights and obligations of Fox and Savoy relative to the purchase of WLUK."

[5] SF Wisconsin submits a copy of a management agreement between its president, Thomas R. Herwitz, and SF Broadcasting L.L.C. That agreement, according to SF Wisconsin, will be superseded by a new employment agreement between Herwitz and SF Wisconsin, in a form "substantially similar" to the document it attaches. As to the "Amended and Restated Employment Agreement" cited in the Subscription and Stockholders Agreement, SF Wisconsin states that that reference now also will refer to the new Herwitz-SF Wisconsin management agreement. And in the October 31, 1994 amendment to its application, see Note 1, supra, Green Bay submitted an amended Subscription and Stockholders Agreement, deleting reference to "a management agreement" between Herwitz and SF Wisconsin.

6. Acceptance of an application means only that that application has been the subject of a "preliminary review" by the Commission's staff as to completeness. 47 C.F.R. §73.3564(b). Therefore, we need not determine at this time whether SF Green Bay's showings are sufficient to demonstrate that it is fully qualified to hold the licenses for WLUK-TV and W40AN. In order that we may make our statutory public interest determination, we retain the right, under Section 73.3514(b) of the Rules, to request further information of SF Green Bay and any other entities or persons we deem to be parties to the application. Upon request and/or receipt of such information, we shall determine the period of time within which an interested party may respond to any new submissions by the applicants. That period of time may, but will not necessarily, encompass some or all of the 30-day period NBC seeks in the alternative. Finally, we note that we may also, upon our own motion, order the applicant to amend the application so as to render it "more definite and certain." 47 C.F.R. §73.3514(b).

7. Accordingly, pursuant to Section 0.283 of the Commission's Rules governing delegated authority, IT IS ORDERED that NBC's request, that the Commission not accept the above-captioned applications for filing, IS DENIED. IT IS FURTHER ORDERED that NBC's alternative request, that the deadline for filing petitions to deny be extended 30 days beyond the date on which the last document necessary to complete the applications, IS DEFERRED, as discussed above. IT IS FURTHER ORDERED that the applications tendered on October 14, 1994 by BBC License Subsidiary L.P. and SF Broadcasting of Green Bay, Inc. for consent to the assignment of WLUK-TV, Green Bay, Wisconsin (BALCT-941014LH), and W40AN, Escanaba, Michigan (BALTT-941014LI), ARE ACCEPTED FOR FILING.

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman
Chief, Video Services Division
Mass Media Bureau

DA 94-1418

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)
	)
The Bell Atlantic Telephone Companies	)
	)
Waiver of Section 69.110, 69.112, 69.305(b), and 69.307(c) of the Commission's Rules to Offer Video Dialtone Service	)

ORDER

Adopted: December 8, 1994 Released: December 8, 1994

Comment Date: December 14, 1994

Reply Date: December 19, 1994

By the Chief, Policy and Program Planning Division:

1. On November 19, 1994, the Bell Atlantic Telephone Companies (Bell Atlantic) filed a petition seeking an expedited waiver of the Commission's rules in order to establish a new rate structure and tariff rate elements for video dialtone service under transport categories of Part 69 of the Commission's rules. We placed the petition on public notice, with comments due December 9, 1994, and replies due December 14, 1994.[1]

2. On December 8, 1994, the National Cable Television Association (NCTA) filed a motion for an Extension of Time on the deadline for filing comments and replies. NCTA requests that the deadline for filing comments be extended until December 14, 1994, and the deadline for filing replies be extended until December 19, 1994. NCTA argues that Bell Atlantic's petition raises serious issues. NCTA argues that the additional time will enable commenting parties to more fully evaluate Bell Atlantic's proposal and to more effectively address the issues raised.

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[1] See Public Notice, Pleading Cycle Established for Comments on Bell Atlantic's Petition for Waiver of Part 69 Rules to Offer Video Dialtone Service, DA 94-1345, Released Nov. 30, 1994.

3. We do not routinely grant extensions of time.[2] We believe, however, that the public interest would be served by providing parties additional time to address the issues. Thus, we grant NCTA's motion and extend the date for filing of comments from December 9, 1994 until December 14, 1994 and for the filing of reply comments from December 14, 1994 to December 19, 1994.

4. Accordingly, IT IS ORDERED that NCTA's Request for Extension of Time IS GRANTED.[3]

Federal Communications Commission

James D. Schlichting
Chief, Policy and Program
Planning Division
Common Carrier Bureau

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[2] 47 C.F.R. § 1.46(a).

[3] This action is taken pursuant to Sections 4(j) and 5(c) of the Communications At of 1934, as amended, 47 U.S.C. §§ 154(j) and 155(c), and authority delegated thereunder pursuant to Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91 and 0.291.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

DA 94-1378

In the Matter of:	)	
	)	
Southwestern Cable TV	)	LOI-93-41
San Diego, California	)	
	)	
Letter of Inquiry	)	

MEMORANDUM OPINION AND ORDER

Adopted: December 2, 1994 **Released**: December 2, 1994

By the Chief, Cable Services Bureau:

I. Introduction

1. The Commission received a Form 329 Complaint on November 1, 1993 concerning the reasonableness of the rates charged for cable programming services by Southwestern Cable TV of San Diego, California ("Southwestern"). In response to this complaint, the Commission issued Letter of Inquiry 93-41 ("LOI") to Southwestern on December 13, 1993.[1] The LOI asked Southwestern to provide information concerning its compliance with the Commission's rules governing evasion in the offering of packages which allegedly are not rate-regulated. Southwestern responded to our LOI on January 11, 1994.

[1] Letter from Roy J. Stewart, Chief, Mass Media Bureau, FCC, to Southwestern Cable TV of San Diego, California, LOI-93-41 (December 13, 1993). Copies of the Letter of Inquiry and Response are available to the public in the FCC's Cable Reference Center, 2033 M Street, N.W., Room 333, Washington, D.C. We also note that there is a pending rate complaint proceeding involving Southwestern. Our decisions made herein will be made a part of that proceeding. Thus, for example, we will not order Southwestern to make refunds to subscribers in regard to Southwestern's purported "a la carte" restructuring. Obviously, however, we may order refunds if we find violations of other rules that should result in refunds.

II. Background

2. In the Cable Television Consumer Protection and Competition Act of 1992 ("the 1992 Cable Act"), Congress created a regulatory scheme giving the Commission and local franchising authorities jurisdiction over the cable programming and equipment rates of non-competitive cable systems. The 1992 Cable Act provides that the rates of cable systems not subject to effective competition may be regulated by local franchising authorities, in the case of basic service, and by the Commission, in the case of cable programming services.[2] A stated policy of the 1992 Cable Act is to ensure that "consumer interests are protected in the receipt of cable service."[3]

3. The 1992 Cable Act requires cable operators to offer subscribers a basic tier that must contain at least all qualified local broadcast signals and, unless otherwise specified by the local franchising authority, public, educational, and governmental channels.[4] The Commission was charged by the 1992 Cable Act with creating regulations that ensure that the rates for the basic service tier are reasonable.[5] The 1992 Cable Act directs that "[s]uch regulations shall be designed to achieve the goal of protecting subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition."[6] Under the 1992 Cable Act, operators may offer other channels in a cable programming service tier or tiers.[7] The 1992 Cable Act orders the Commission to create regulations for the cable programming service tiers that allow it to

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[2] Communications Act of 1934, as amended, § 623 (a)(2), 47 U.S.C. § 543 (a)(2) (1992).

[3] Pub. L. No. 102-385 § 2 (b) (4), 106 Stat. 1460 (1992); *see also* H.R. Rep. No. 628, 102d Cong., 2d Sess. at 34 (1992).

[4] Communications Act of 1934 § 623 (b)(7)(A)(ii-iii), 47 U.S.C. § 543 (b)(7)(A)(ii-iii) (1992); *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket 92-266, *Report and Order and Further Notice of Proposed Rulemaking*, 8 FCC Rcd 5631 at ¶¶ 157-161 (1993) (*"Rate Order"*) (franchising authorities may require operators to carry PEG channels on tiers other than basic).

[5] Communications Act of 1934 § 623 (b)(1), 47 U.S.C. § 543 (b)(1) (1992).

[6] *Id.*

[7] Communications Act of 1934 § 623(l)(2), 47 U.S.C. § 543(l)(2) (1992).

identify individual cases of unreasonable rates.[8] The 1992 Cable Act thus protects consumers' interests in continuing to receive the basic service tier and cable programming service tiers at reasonable rates.

4. The 1992 Cable Act requires the Commission to adopt standards and guidelines to prevent evasions, "including evasions that result from retiering."[9] The 1992 Cable Act's legislative history states that the Commission should scrutinize offerings of non-traditional stand-alone services to "prevent repricing, retiering, or other alterations of rate structures" that could have the effect of evading the purposes of rate regulation.[10] This provision in the 1992 Cable Act is intended to give the Commission the authority to address changes in the cable industry's business practices that would thwart the intent of rate regulation.[11]

5. In the *Rate Order* the Commission defined evasion as "any practice or action which avoids the rate regulation provisions of the Cable Act or Commission rules contrary to the intent of the Act or its underlying policies."[12] We must scrutinize a particular operator's marketing or pricing practices to determine whether those practices have the effect of avoiding the requirements of our rate regulations, contrary to the intent of the 1992 Cable Act and our rules.

III. Facts

6. Before September 1, 1993, Southwestern's services included a 17-channel basic tier, called Basic Cable Service, for $10.95 per month, and a 22-channel cable programming service tier, called Standard Cable Service, for $13.37 per month.

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[8] Communications Act of 1934 § 623 (c)(1)(A), 47 U.S.C. § 543 (c)(1)(A) (1992). Identification of individual cases of unreasonable rates is achieved by a process in which the Commission assumes jurisdiction over systems where a complaint about a cable programming service tier rate is filed.

[9] Communications Act of 1934 § 623(h), 47 U.S.C. § 543(h) (1992).

[10] H.R. Rep. No. 628 at 79.

[11] S. Rep. No. 92, 102d Cong., 2d Sess. at 77 (1992).

[12] *Rate Order* ¶ 451.

7. The following chart summarizes Southwestern's service tier offerings prior to September 1, 1993:

Offering	Channels	Price
1. Basic Cable Service	17	$10.95
2. Standard Cable Service	22	$13.37
TOTAL	39	$24.32

8. Beginning September 1, 1993, the date our rate regulations became effective, Southwestern restructured its service offerings. Southwestern's restructured service offerings included an 18-channel basic tier, called Basic Cable Service, for $10.84 per month and a 20-channel cable programming service tier, called Standard Cable Service, for $11.98 per month. Southwestern states that it also began offering four channels on an individual and package basis. The four channels were WTBS, WGN, AMC, and the Discovery Channel. Two of these channels, WTBS and WGN, previously were included in the Basic Cable Service and two channels, AMC and Discovery, previously were included in the Standard Cable Service. Southwestern states that the four channels could be purchased individually for $0.50 each or as a package, called Plus Package, for $1.50.

9. The following chart summarizes Southwestern's service tier options as of the date of its response to our LOI:[13]

Offering	Channels	Price
1. Basic Cable Service	18	$10.84
2. Standard Cable Service	20	$11.98
3. Plus Package	4	$1.50 or $0.50 per channel
TOTAL	42	$24.32 (if purchased package)

[13] This Order does not evaluate Southwestern's rates for its basic and cable programming service tiers. These rates are subject to review by the local franchising authority and the Commission in separate proceedings.

10. Southwestern Cable TV argues, *inter alia*, that it began offering its services individually and through its package in order to implement Congress' intent to maximize consumer choice. However, based on the record, very few consumers elected to exercise that choice. As of the date of its response, Southwestern states that of 160,000 total subscribers, 151,000 received the package while only 3,900 or 2.4 percent selected channels on an individual basis.

IV. Discussion

11. The 1992 Cable Act requires the Commission to adopt standards and guidelines to prevent evasions, "including evasions that result from retiering."[14] An evasion, as defined by the Commission, is an act or practice that "avoids the rate regulation provisions of the [Cable] Act or our rules contrary to the intent of the Act or its underlying policies."[15] In the *Rate Order*, we stated that "retiering otherwise permitted under our rules will not be deemed an evasion."[16] First, we examine whether Southwestern's response to the LOI shows that its restructuring of its offerings had the effect of evading rate regulation for the channels that Congress intended to be rate-regulated.

12. Southwestern's restructuring, effective September 1, 1993, involved its movement of two channels (WTBS and WGN) from its 17-channel Basic Cable Service and two channels (AMC and the Discovery Channel) from its 22-channel Standard Cable Service to create the four-channel package that it alleges is not rate-regulated. Thus, Southwestern removed channels from otherwise rate-regulated tiers to create a new package of channels. In so doing, Southwestern avoided application of our rate regulations which generally required cable operators to reduce rates by about 10 percent. That is, if Southwestern had not restructured on September 1, 1993, it would have been required to recalculate its rates in accordance with the *Rate Order* we released on May 3, 1993, which generally required cable operators to reduce their rates. Moreover, it appears that customers who received the four channels prior to restructuring were automatically subscribed to the Plus Package effective September 1, 1993. There appears to be no sufficient justification for Southwestern's restructuring other than to avoid rate regulation.

13. Other factors corroborate our view that Southwestern's restructuring may have had the effect of avoiding rate regulation. First, it offered this package on the eve of regulation. Second, it apparently automatically subscribed customers to the offerings that previously had been part of its basic and cable programming service tiers. In light of these facts, it appears that Southwestern's restructuring of its offerings may have evaded rate regulation. We will not find an actual evasion occurred, however, if Southwestern's action

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[14] Communications Act of 1934 § 623(h), 47 U.S.C. § 543(h) (1992).

[15] *Rate Order* ¶ 451.

[16] *Id.* at ¶ 453.

complied with our a la carte policy that was in effect at the time of its restructuring. If the offering met our requirements for a permissible collective offering of a la carte channels, then Southwestern would not have evaded our rate regulations because it would not be required to reduce its price for the collective a la carte package.[17]

14. In our *Rate Order*, the Commission recognized that "a la carte packages" appear to be "cable programming services," but said that "interpreting the statute in such a literal fashion could disadvantage consumers by denying them discounts on packages of per-channel or per-program services and by limiting subscriber access to a greater quantity of premium programming."[18] Thus, we envisioned that cable operators, for the most part, would offer channels that previously had been offered a la carte in discounted packages, and concluded that it would be better for consumers if we construed the 1992 Cable Act to permit such discounting.[19] This is not the type of offering that Southwestern and others have provided their subscribers. Specifically, these operators did not offer a discounted package of channels that previously had been offered a la carte to subscribers, but instead removed channels from a tier that would be subject to our rate regulations.

15. Moreover, in the *Rate Order*, the Commission determined that such a la carte packages would be exempt from rate regulation, i.e., would be deemed not to fall within the definition of "cable programming service," if two conditions were met: (1) the price for the combined package must not exceed the sum of the individual charges for each component service; and (2) the cable operator must continue to provide the component parts of the package to subscribers separately in addition to the package. The Commission said that the

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[17] In our *Going Forward Order*, we have reconsidered our regulatory treatment of collective offerings of a la carte channels. *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking,* MM Docket Nos. 92-266 and 93-215, FCC 94-286 (adopted November 10, 1994) *("Going Forward Order")*. Specifically, we have determined that such packages are cable programming service tiers within the meaning of Section 3(l)(2) of the 1992 Cable Act and therefore will be subject to our general rate regulation rules. *Id* at ¶46. However, in order to determine whether Southwestern evaded rate regulation when it restructured its offering, we must evaluate its a la carte package under the rules that were in effect when it restructured.

[18] *Rate Order* ¶ 329.

[19] *See, e.g., Rate Order* ¶ 453 n.1161 ("There is no evidence that operators would or, as a business matter, could shift programming previously offered as part of a tier to 'a la carte' status, *i.e.*, a per-channel or per-program offering, to avoid the rate regulation applicable to tiers").

second condition would be satisfied only when "the per channel offering provides consumers with a realistic service choice."[20]

16. Under the two-part test that we set forth in the *Rate Order*, it is clear, first, that the price for the combined package does not exceed the sum of the individual charges for the four services, because subscribers may purchase the four channels for $0.50 each or the four-channel package for $1.50. The second part of the test is whether the separate parts of the package constitute a "realistic service offering." Our review of Southwestern's submission reveals that only 2.4 percent of Southwestern's subscribers chose to select channels on an individual basis.[21] Our test does not specify what number would indicate that an offering is "a realistic service offering." However, the fact that only 2.4 percent of subscribers took channels on an individual basis, together with the other factors present in this case,[22] tends to show, in this instance, that the per-channel offering does not constitute a realistic service offering.

17. Even if we were to apply the 15 interpretive guidelines set forth in our *Second Reconsideration Order*,[23] we still would not reach a clear answer to the question of what constitutes a realistic service offering. Although some factors support a finding that Southwestern's offering was not a permissible a la carte package, other factors point the other way. In particular, although a "significant percentage" of the channels offered in the a la carte package (100 percent) was removed from regulated tiers, the absolute number (four) was small.[24] Moreover, our test does not explain how the factors are to be weighed against

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[20] *Id.* at ¶¶ 327-28 & n.808. In the *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket No. 92-266, *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, 9 FCC Rcd 4119 (1994) (*"Second Reconsideration Order"*), the Commission affirmed its prior view. It said that "we continue to believe that the public interest will be served by generally permitting non-regulated treatment of collective offerings of 'a la carte' channels if the offering enhances consumer choice and does not constitute an evasion of rate regulation." *Id.* at ¶ 194. In this regard, we retained the two-part test contained in the *Rate Order* for determining when we would refrain from regulating "a la carte packages." In addition, the Commission set out 15 guidelines to enable operators to better determine what collective offerings of "a la carte" channels will be considered "realistic service offerings." *Id.* at ¶ 195.

[21] *See* ¶ 10, *supra*.

[22] *See, e.g.*, ¶¶ 12-13, *supra*.

[23] *Second Reconsideration Order* at ¶ 196.

[24] *Id.*

each other. In these circumstances, we cannot say that it was clear to Southwestern that its restructuring was not a permissible a la carte package.

18. In our recently adopted *Going Forward Order*, we have reconsidered our rules relating to a la carte packages and concluded that such packages are cable programming service tiers within the meaning of Section 3(l)(2) of the 1992 Cable Act. For that reason, the package at issue is subject to rate regulation and cannot continue to be treated as an unregulated package of channels. In reaching this conclusion in the *Going Forward Order*, we acknowledged that, as applied to many fact patterns, we did not provide a clear test in the *Rate Order* and the *Second Reconsideration Order* for determining whether an a la carte package was permissible. In adopting the 15 interpretive guidelines in the *Second Reconsideration Order* to supplement the *Rate Order's* two-prong test, we hoped to enable operators to better determine what collective offerings of a la carte channels would be considered a realistic service offering, and, hence, not an evasion of rate regulation.[25] Our experience to date, however, indicates that our efforts did not produce the intended result and that, instead, there has been confusion as to whether collective offerings of a la carte channels constituted an evasion of rate regulation. Indeed, we cannot say that it is clear that Southwestern's restructuring was not a permissible a la carte package.

19. For that reason, we do not think that it would be equitable to subject Southwestern to refund liability. This result is distinguishable from the result we reached in *Adelphia Cable Partners, L.P.*,[26] in which we determined that we will require refunds if Adelphia's rate justification proceedings show that subscribers' rates were higher than our rules permitted. In that case, the cable operator announced that it would offer all the channels previously offered on a cable programming service tier on an individual basis or as a collective offering of a la carte channels. In so doing, Adelphia removed an entire service tier from rate regulation. In contrast, Southwestern attempted to treat only four channels as an unregulated collective offering of a la carte channels. Moreover, while we have indicated above that our rules for determining whether collective offerings of a la carte channels constitute an evasion were in many instances difficult to apply, we do not believe that our a la carte rules are unclear as applied to the fact pattern in the *Adelphia* case. In the *Rate Order*, we stated that a cable operator could not escape rate regulation simply by calling what otherwise would be a rate regulated tier an a la carte package.[27] We reiterated this

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[25] *See Going Forward Order* at ¶40.

[26] *Adelphia Cable Partners, L.P.*, South Dade County, Florida, LOI-93-42, DA 94-1277 (released November 18, 1994).

[27] *Rate Order*, 8 FCC Rcd 5837, n.808 ("we do not think a cable operator can escape rate regulation simply by announcing that tiered services are available a la carte").

admonition in the *Second Reconsideration Order* when we warned against eliminating "an entire regulated tier" and "turning it into an a la carte package."[28]

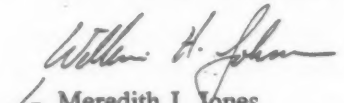
21. We will not require Southwestern to restructure its tiers so as to return the channels offered in the a la carte package to the basic or cable programming service tiers.[29] Instead, on a prospective basis, we will consider Southwestern's collective offering of a la carte channels a new product tier[30] even though it would not qualify as a new product tier under our recently announced *Going Forward Order* because one of the conditions for a new product tier is that channels may not be removed from a basic service tier or a cable programming service tier. In light of the prior confusion over what constituted a permissible a la carte offering, and because Southwestern's four-channel tier, unlike Adelphia's offering, did not constitute a clear evasion of our rate rules, we see no good reason to subject Southwestern or its San Diego customers to the confusion and transaction costs that would result if we required Southwestern to retier.

V. Ordering Clauses

22. Accordingly, IT IS ORDERED that Southwestern's package as it existed on December 13, 1993, may be treated as a new product tier under our *Going Forward Order*.

23. IT IS FURTHER ORDERED that this Order is EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION



Meredith J. Jones
Chief, Cable Services Bureau

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[28] *Second Reconsideration Order* ¶ 196.

[29] We are not precluding Southwestern from treating this package as a cable programming service tier, priced pursuant to our rules, or from putting the channels back into an existing tier.

[30] *See Going Forward Order* ¶¶16-37.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	DA 94-1156
	)	
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY	)	File No. ENF-95-01
	)	
Apparent Liability for Forfeiture	)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: October 14, 1994; Released: October 14, 1994

By the Deputy Chief (Policy), Common Carrier Bureau:

I. INTRODUCTION

1. By this Notice of Apparent Liability for Forfeiture (NAL), we initiate enforcement action against New England Telephone and Telegraph Company (NET). For the reasons discussed below, we find that NET apparently violated Section 226 of the Communications Act of 1934, as amended, 47 U.S.C. § 226 (the Act) and Section 64.703 of the Commission's rules, 47 C.F.R. § 64.703, by failing timely to post the correct name, address, and toll-free telephone number of the operator services provider on certain of its pay telephones (sometimes referred to as "payphones"). Based on our review of the facts and circumstances surrounding the willful and repeated violations, we find that NET is apparently liable for a forfeiture in the amount of $18,000.

II. BACKGROUND

2. Section 226(c)(1)(A)(i) of the Act and Section 64.703(b)(1) of the Commission's rules require aggregators[1] to post the name, address, and toll-free telephone number of the provider of operator services[2] on or near their telephones and in plain view of consumers.

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1 An aggregator is defined as "any person that, in the ordinary course of its operations, makes telephones available to the public or to transient users of its premises, for interstate telephone calls using a provider of operator services." 47 U.S.C. § 226(a)(2); 47 C.F.R. § 64.708(b).

2 The provider of operator services is the "common carrier that provides operator services" to the telephone in question. 47 U.S.C. § 226(a)(9); 47 C.F.R. § 64.708(i). Operator services are "interstate telecommunications service[s] initiated from an aggregator location that include[], as a component, any automatic or live assistance to a consumer to arrange for billing or completion, or both, of an interstate telephone call" by methods other than automatic completion

3. Between May 20, 1993, and August 31, 1993, the Common Carrier Bureau (Bureau) received a number of informal complaints alleging that several pay telephones operated by New York Telephone Company (NYT) and NET were presubscribed to a provider of operator services other than the provider whose name was posted. In each case, the Bureau's staff served the complaint on NYT or NET pursuant to Section 1.717 of the Commission's rules, 47 C.F.R. §1.717.[3] NYT and NET do not dispute the fact that the payphones cited by the complainants were incorrectly labelled. The mislabelling of payphones in New York City has been the subject of news reports and mislabelling throughout the state has prompted the New York State Consumer Protection Board (CPB) to request that the Commission require NYT to implement remedial and preventative measures.[4]

4. On May 31, 1994, NYNEX responded on behalf of NYT to the CPB Letter.[5] In its response, NYNEX explained that orders received by NYT to change the primary interexchange carriers (PICs) to which payphones have been presubscribed have increased substantially, especially for frequently used pay telephones. NYNEX attributed some of the increase in the PIC change volume to unauthorized conversions by certain long distance carriers, a practice commonly referred to as "slamming." NYNEX noted that during 1993 NYT had processed 362,000 PIC changes for its 116,000 payphones in the state of New York, an average of three PIC

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with billing to the originating telephone or completion through the consumer's use of an access code with billing to the consumer's pre-existing account. 47 U.S.C. § 226(a)(7); 47 C.F.R. § 64.708(g).

3 See Files Nos. IC-93-07009, 07307, 10639 and 10640. With regard to File No. IC-93-07307, the incorrect posting was corrected on July 19, 1993. Letter from R. Worth to James F. Balaguer (Aug. 4, 1993). The posting regarding File No. IC-93-07009 was corrected sometime in mid-to-late July 1993. Letter from M. Dutton to Richard G. Gould (Aug. 3, 1993). Because enforcement actions must be brought within one year of the violation, these complaints do not form any part of the basis for this enforcement action. See 47 C.F.R. § 1.80(c)(3). The incorrect labelling documented in File No. IC-93-10639 appears to have been corrected sometime between October 14, 1993 and December 28, 1993. Letter from Robert S. Kennedy to Kathie A. Kneff (Dec. 28, 1993). The mislabelling documented in File No. IC-93-10640 was corrected on October 14, 1993. Letter from Robert S. Kennedy to James Balaguer (Dec. 29, 1993). These two informal complaints form the basis for this enforcement action and NAL.

4 The CPB noted an estimate attributed to NYT that as many as 40,000 of the approximately 120,000 payphones in New York state were mislabelled. Letter from Joel Blau and Philip S. Shapiro to William Caton (Apr. 14, 1994) (CPB Letter).

5 Letter from William J. Balcerski to William F. Caton (May 31, 1994) (NYNEX Letter).

changes per telephone. NYNEX further noted that PICs may be changed on heavily used payphones as often as several times per month. NYNEX concluded that because of the volume of PIC changes, NYT has been unable to correct the labelling on its payphones on a timely basis.[6]

5. To alleviate the problem, NYNEX stated that, effective on or about July 1, 1994, NYT would alter its procedures for processing PIC changes in an effort to reduce the volume of PIC changes to a more manageable level and to protect against slamming. Specifically, it would (1) require interexchange carriers to submit PIC changes on paper or by fax rather than by electronic means or magnetic tape, and (2) require its customer service representatives to verify a PIC change with the customer of record prior to completing the PIC change.[7]

6. NYNEX has represented to the Commission that NET has experienced similar problems with its PIC change procedures, including delays in relabelling its payphones following a PIC change, and that NET would be implementing the same procedures as NYT in an attempt to correct the problem.[8]

7. On May 9, 1994, representatives of the Bureau's Enforcement Division met with representatives of NYNEX to discuss the CPB letter and the evident delays by NYT and NET in correcting the labels on their payphones. NYNEX's statements at that meeting are essentially restated in its response to the CPB Letter and in the NET Letter.

III. DISCUSSION

8. We have carefully evaluated the information obtained as a result of our investigation and we conclude that NET is apparently liable for forfeiture for willful and repeated violations of the Communications Act and the Commission's rules.[9] Section 226(c)(1)(i) of the Act and Section 64.703(b)(1) of the Commission's rules make clear that the name, address, and toll-free telephone number of the operator services provider to that telephone shall be posted on or near the telephone in plain view of consumers. NET has admitted that long periods of time elapsed before it updated this information on some of

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6 NYNEX Letter at 1-3; Letter from Robert S. Kennedy to James Balaguer (Dec. 29, 1993).

7 NYNEX Letter at 1-3; Letter from Robert S. Kennedy to James Balaguer (Dec. 29, 1993).

8 Letter from Robert S. Kennedy to Kathie A. Kneff (June 9, 1994) (NET Letter).

9 The staff's investigation also disclosed failures by NYT to relabel certain of its payphones in violation of Section 226(c)(1)(i) of the Act and Section 64.703(b)(1) of the Commission's rules. While Section 1.80(c)(3) of our rules prevents us from imposing a forfeiture on NYT, we strongly admonish NYT for its actions.

its payphones.[10] Indeed, it appears from the informal complaints upon which this action is based that in these specific instances, NET took more than two months to update the required information.[11]

9. We recognize that payphone relabelling cannot be instantaneous once the processing of a PIC change is completed. We, however, find that a delay of more than two months is unreasonable. Over the course of two months, a significant number of consumers may use a given payphone, particularly heavily used payphones such as the ones NYNEX describes in its response to the CPB Letter. It follows that many members of the public may have been misled, and, in any event, were denied access to accurate information to which they were entitled that would have assisted them in making informed decisions in their purchases of telecommunications services.

10. Under Section 503 of the Communications Act, common carriers that have violated the Act's provisions, the Commission's rules, or Commission orders are subject to monetary forfeitures of up to $100,000 per violation.[12] Section 503(b)(2)(B) also provides that for a continuing violation of the Act or a Commission rule involving a single act or failure to act, the forfeiture penalty shall not exceed $1,000,000 for a common carrier subject to the provisions of the Act. In setting the exact amount of the forfeiture, the Commission, or the Bureau on delegated authority, is to consider certain factors set forth in the Communications Act. These factors include "the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."[13]

11. Looking at the totality of circumstances surrounding NET's violations in these two proceedings and considering these factors, we find that a forfeiture in the amount of $18,000 is appropriate. In setting this amount, we have considered NET's overall history of compliance with the Communications Act and the Commission's rules and orders, and the difficulties associated with relabelling the numerous payphones for which it received PIC change orders during 1993. While the facts surrounding NET's violations do not absolve it of responsibility to label its payphones properly or relieve it of liability for failure to do so, the facts do serve to mitigate its

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10 See, e.g., NET Letter.

11 In File Nos. IC-93-10639 and IC-93-10640, it appears that the PIC was changed for the payphones in question on June 12, 1994. The payphones, however, still had not been relabelled as of August 27, 1994, when the complainant used them. The payphones continued to be labelled incorrectly for at least eight more weeks. See n.3, supra.

12 47 U.S.C. § 503(b)(1)(B), (b)(2)(B); See also 47 C.F.R. § 1.80(b)(2).

13 47 U.S.C. § 503(b)(2)(D).

level of culpability. We have also considered NET's cooperation and forthrightness with the staff during this investigation.

IV. CONCLUSION AND ORDERING CLAUSES

12. Based on the staff's investigation, we find that New England Telephone and Telegraph Company violated Section 226(c) of the Communications Act, 47 U.S.C. § 226(c) and Section 64.703(b) of the Commission's rules, 47 C.F.R. § 64.703(b), by failing to post in plain view of consumers on or near the payphones described in File Nos. IC-93-10639 and IC-93-10640 the name, address, and toll-free telephone number of the provider of operator services. Applying the factors set forth in Section 503(b)(2)(D), 47 U.S.C. § 503(b)(2)(D), we find that a forfeiture in the amount of $18,000 is appropriate. We also find that because the forfeiture amount is less than $20,000, the Bureau has delegated authority to issue this notice of apparent liability.

13. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act, 47 U.S.C. § 503(b), Section 1.80 of the Commission's rules, 47 C.F.R. § 1.80, and the authority delegated in Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that New England Telephone and Telegraph Company IS HEREBY NOTIFIED of an Apparent Liability for Forfeiture in the amount of $18,000 (eighteen-thousand dollars) for its willful and repeated violations of Section 226(c) of the Communications Act, 47 U.S.C. § 226(c) and Section 64.703(b) of the Commission's rules, 47 C.F.R. § 64.703(b), by failing to post in plain view of consumers on or near the payphones described in File Nos. IC-93-10639 and IC-93-10640 the name, address, and toll-free telephone number of the provider of operator services.

14. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's rules, 47 C.F.R. § 1.80(f)(3), that New England Telephone and Telegraph company SHALL PAY within thirty (30) days of the release of this notice the full amount of the forfeiture ordered here in the manner provided for in Section 1.80(h) of the rules[14] or SHALL FILE a response showing why the forfeiture should not be imposed or should be reduced.

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14 The forfeiture amount should be paid by check or money order drawn to the order of the Federal Communications Commission. Reference should be made on NET's check or money order to "NAL/Acct. No. 516EF001." Remittances should be mailed to Federal Communications Commission, P.O. Box 73482, Chicago, IL 60673-7482.

15. IT IS FURTHER ORDERED that a copy of this Notice of Apparent Liability for Forfeiture SHALL BE SENT by certified mail to New England Telephone and Telegraph Company's Counsel, William J. Balcerski, Esq., Telesector Resources Group, 120 Bloomingdale Road, White Plains, NY 10605.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz

Kathleen B. Levitz
Deputy Chief (Policy)
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C.

DA 94-1153

In the matter of	)	
	)	
Comcast Cablevision of Maryland	)	CUID Nos. MD0080 through MD0100
Baltimore County, Maryland	)	
	)	
Benchmark Filing To Support	)	
Cable Programming Service Price	)	

Memorandum Opinion and Order

Adopted: November 8, 1994 Released: November 9, 1994

By the Chief, Cable Services Bureau:

Introduction

1. Here we consider four complaints about the price Comcast Cablevision of Maryland ("Comcast") was charging for its cable programming service ("CPS") tier in Baltimore County, Maryland, CUID Nos. MD0080 through MD0100.[1] Comcast has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This order addresses the reasonableness of Comcast's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[2]

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[1] According to Comcast, CUID numbers MD0080 through MD0100, inclusive, together constitute a single franchise area. Letter from Ernest A. Pighini to FCC, para. 1 (Aug. 25, 1994). Thus, the Commission's receipt of a valid complaint from a subscriber living in any one of these CUID areas gives the Commission jurisdiction over Comcast's price for the CPS tier throughout the franchise area. *See* 47 C.F.R. § 984(a) (prices must be uniform throughout a franchise area).

[2] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Comcast has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration*, n.8 *infra*, the maximum permitted CPS price determined herein might

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[3] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[4] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[5] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[6]

3. The Commission's original rate regulations took effect on September 1, 1993.[7] The Commission subsequently revised its rate regulations effective May 15, 1994.[8] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[9] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[10] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[11]

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also apply from May 15, 1994 until the date on which Comcast implemented its CPS price under the new regulations. See para. 3, *infra*.

[3] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[4] 47 C.F.R. § 76.956.

[5] 47 C.F.R. § 76.956(b).

[6] *Id.*

[7] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[8] *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) ("*Second Order on Reconsideration*"); 47 C.F.R. § 76.922(b).

[9] *See Second Order on Reconsideration* at 4190, paras. 150-152.

[10] *Id.*

[11] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189, n.195.

Procedural Matters

4. The first valid CPS complaint was completed and served on Comcast on February 23, 1994. The Commission received the complaint on February 23, 1994.

5. Comcast attempted to justify its CPS price through an FCC Form 393 filed on March 23, 1994. Comcast amended its justification twice: on June 24, 1994 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally,[12] then on August 25, 1994 in response to a Commission letter citing still unresolved deficiencies in Comcast's amended showing.[13]

6. In its August 25, 1994 amendment Comcast asserts that the complainant objects not to Comcast's price for the CPS tier, but rather to an unregulated administrative service fee. We reject that argument. Although the complaint form refers to an administrative fee, the rate complained about is the entire monthly bill, including a charge for the CPS tier. The Commission therefore has jurisdiction over this complaint regarding the price charged for the CPS tier. (Comcast also disputes the validity of subsequent complaints filed by other cable subscribers. Because we have accepted this complaint as properly filed, we find it unnecessary to rule on Comcast's objections to these later filed complaints.)

Discussion

7. Comcast asserts that its monthly CPS tier price of $15.33 per subscriber is justified by its benchmark filing because its price is less than the maximum permitted charge of $15.40 as calculated in the filing. However, upon review we have determined that Comcast has not correctly calculated its maximum permitted price, and it is therefore appropriate to make the following adjustments to Comcast's calculations in Form 393:

a. Comcast's calculations for its rate-regulated package as of the initial date of regulation (Form 393, Part II, Worksheet 1) reflect 35 satellite channels. However, nine of these 35 channels did not carry rate-regulated satellite programming during the majority of programming hours: channel 17 carried 22 hours of non-satellite or "other" programming titled "Essex Community College" daily; channel 19 was evenly split between Dundalk Community College programming (listed as "other") and NASA/Select (listed as satellite); channel 20 had 14 hours of "other" programming (Catonsville Community College) and 10 hours of rate-regulated satellite programming (Mind Extension University); channels 22, 26 and 39 each carried a local broadcast public television station (non-satellite) more than 12 hours per day;

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[12] *Cable Operators' Rate Justification Filings*, DA 94-526 (released May 23, 1994).

[13] Letter from John M. Spencer to Donald R. Erickson, Vice President and Controller, Comcast Cablevision of Maryland (Aug. 11, 1994).

channel 36 carried Baltimore County Board of Education programming (non-satellite) 16 hours per day; and channels 49 and 50 each had 16 hours per day of pay-per-view programming not subject to rate regulation.

Our policy on "split" channels is to categorize them according to their preponderance of use. This policy is based on the fact that the 1992 price survey underlying the benchmark system was analyzed based on whole, not fractional, channel counts. Under the benchmark system in effect prior to May 15, 1994, all channels must be characterized as either rate-regulated or not rate-regulated and as either satellite or non-satellite. A "channel" is defined as a "unit of cable service identified and selected by a channel number or similar designation." FCC Form 393, p. 10. The preponderance-of-use test is the only one consistent with this conceptual framework. *See Questions and Answers on Cable Television Rate Regulation*, Q and A No. 1 (released June 1, 1994). We therefore adjust the number of rate-regulated satellite channels reflected in Worksheet 1 from 35 to 26, reducing the benchmark channel rate entered on Line 121 of Worksheet 1.

b. Comcast also incorrectly counts channels 49 and 50 as rate-regulated channels as of the initial date of regulation on Form 393, Part I, and on Form 393, Part II, Worksheet 1. Each of these channels carried 16 hours per day of pay-per-view programming not subject to rate regulation, and only 8 hours of rate-regulated programming. For the same reason noted above, we therefore reduce the number of channels on the CPS tier as of the initial date of regulation from 28 to 26.

c. Similarly, in its calculations in Form 393, Part II, Worksheet 2, Comcast incorrectly counts two channels as satellite channels as of September 30, 1992, although neither carried preponderantly satellite-delivered programming. (Channel 6's hours were evenly split between satellite and "other" programming, and channel 36 carried 15 hours per day of non-satellite programming from the Baltimore County Board of Education.) We therefore adjust the number of 1992 rate-regulated satellite channels from 22 to 20, thereby reducing the benchmark channel rate entered on Line 220 of Worksheet 2.

8. Because of these errors, we conclude that Comcast has failed to demonstrate that its price for the CPS tier was not unreasonable. We will therefore set a price for this tier, incorporating the adjustments discussed above. In doing so, we must also recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheet 1, on the basis of the most accurate data currently available for the date as to which Comcast filed.[14] On its amended Form 393, Comcast calculated the Inflation Adjustment Factor as of the end of January 1994 using data released on December 1, 1993. On July 29, 1994, the U.S. Department of

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[14] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 126.5 for the fourth quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through January 1994, the base date Comcast used in justifying its rates, of 1.037.

9. These adjustments have the cumulative effect of reducing the maximum permitted monthly CPS tier price from $15.40 (as Comcast calculated) to $14.55.

10. Conclusions. Upon review of the record herein, we conclude that Comcast Cablevision has demonstrated that $14.55 per month (plus franchise fee) was the maximum reasonable CPS tier price for the period February 23, 1994 to May 14, 1994.[15] We further determine that we will order an appropriate refund pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amount they paid in excess of a reasonable price.

11. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the February 23, 1994 complaint against the cable programming service price charged by Comcast Cablevision of Maryland in Baltimore County, Maryland, CUID Nos. MD0080 through MD0100, and all other complaints relating to the same price, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

12. IT IS FURTHER ORDERED, that the benchmark filing submitted by Comcast Cablevision of Maryland with respect to Baltimore County, Maryland, CUID Nos. MD0080 through MD0100, for the period of February 23, 1994 to May 14, 1994, justifies a maximum price of $14.55 per month (plus franchise fee) for Comcast Cablevision of Maryland's cable programming service tier.

13. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Comcast Cablevision of Maryland shall refund to subscribers that portion of the amounts paid for cable programming service from February

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[15] This finding is based solely on the representations of Comcast listed in paragraph 5, *supra*, and the modifications described in paragraphs 7 and 8, *supra*, and on our treatment of Comcast's *a la carte* offerings as unregulated pending further review. Should information come to our attention that these representations (including representations as to the status of *a la carte* packages or data regarding installations and customer equipment) were materially inaccurate, or should we later determine that the *a la carte* channels should be treated as a regulated offering, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

23, 1994[16] to May 14, 1994, that exceeded $14.55 (plus franchise fee) per month and was thus unreasonable, plus interest to the date of the refund.

14. IT IS FURTHER ORDERED, that Comcast Cablevision of Maryland shall promptly determine the overcharges to CPS subscribers for the stated period, and shall within 21 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 30 days of Commission approval thereof.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[16] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

Before the
Federal Communications Commission
Washington, D.C.

DA-94-1152

In the matter of	)	
	)	
Lincoln CableVision	)	CUID No. NE0032
Lincoln, Nebraska	)	
	)	
Benchmark Filing To Support	)	
Cable Programming Service Price	)	

Memorandum Opinion and Order

Adopted: November 8, 1994 Released: November 9, 1994

By the Chief, Cable Services Bureau:

Introduction

1. Here we consider two complaints about the price Lincoln CableVision ("CableVision") was charging for its cable programming service ("CPS") tier in Lincoln, Nebraska, CUID No. NE0032. CableVision has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This order addresses the reasonableness of CableVision's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[1]

[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent CableVision has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration*, n.7 *infra*, the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which CableVision implemented its CPS price under the new regulations. See para. 3, *infra*.

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

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[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) ("*Second Order on Reconsideration*"); 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration* at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189, n.195.

Procedural Matters

4. The first valid CPS complaint was completed and served on CableVision on October 11, 1993.[11] The Commission received the complaint on October 18, 1993.[12]

5. CableVision attempted to justify its CPS price through an FCC Form 393 filed on November 12, 1993. CableVision amended its justification twice: on June 23, 1994 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally,[13] then on August 29, 1994 in response to a Commission letter citing still unresolved deficiencies in CableVision's amended showing.[14]

Discussion

6. CableVision asserts that its monthly CPS tier price of $9.35 per subscriber is justified by its benchmark filing because its price is equal to the maximum permitted charge of $9.35 as calculated in the filing. Upon review of CableVision's Form 393, we have found no apparent errors that would require a recalculation of CableVision's maximum permitted CPS price.

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[11] The complaint was dated October 11, 1993 and states that it was mailed to CableVision on that date. CableVision has not complied with 47 C.F.R. § 76.956(a), which required it to state when service occurred. Under these circumstances we will consider October 11, 1993 as the service date.

[12] We note that at least one other apparently valid complaint regarding the same price was subsequently filed by the City of Lincoln. CableVision did not respond to the City of Lincoln's complaint, as required by 47 C.F.R. § 76.956(a). *See also Cable Operators' Rate Justification Filings,* DA 94-526 (released May 23, 1994), para. 3(4) (clarifying that a copy of every complaint that has not been returned by the Commission must be attached to the operator's response).

[13] *Cable Operators' Rate Justification Filings,* DA 94-526 (released May 23, 1994).

[14] Letter from John M. Spencer to Bradford B. Hunter, Treasurer, Lincoln CableVision (Aug. 15, 1994).

Conclusions

7. Upon review of the record herein, we conclude that CableVision has demonstrated that $9.35 per month (plus franchise fee) was the maximum reasonable CPS tier price for the period October 18, 1993 to May 14, 1994.[15]

8. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the October 11, 1993 complaint against the cable programming service price charged by Lincoln CableVision in Lincoln, Nebraska, CUID No. NE0032, and all other complaints relating to the same price, ARE DENIED TO THE EXTENT INDICATED HEREIN.

9. IT IS FURTHER ORDERED, that the benchmark filing submitted by Lincoln CableVision with respect to Lincoln, Nebraska, CUID No. NE0032, for the period of October 18, 1993 to May 14, 1994, justifies a maximum price of $9.35 per month (plus franchise fee) for Lincoln CableVision's cable programming service tier.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[15] This finding is based solely on the representations of CableVision listed in paragraph 5, *supra*, and on our treatment of CableVision's *a la carte* offerings as unregulated pending further review. Should information come to our attention that these representations (including representations as to the status of *a la carte* packages or data regarding installations and customer equipment) were materially inaccurate, or should we later determine that the *a la carte* channels should be treated as a regulated offering, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C.

DA 94-1150

In the matter of	)	
	)	
Viacom Cable	)	CUID No. TN0644
Goodlettsville, Tennessee	)	
	)	
Benchmark Filing To Support	)	
Cable Programming Service Price	)	

Memorandum Opinion and Order

Adopted: November 8, 1994 Released: November 9, 1994

By the Chief, Cable Services Bureau:

Introduction

1. Here we consider a complaint about the price Viacom Cable ("Viacom") was charging for its cable programming service ("CPS") tier in Goodlettsville, Tennessee, CUID No. TN0644. Viacom has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This order will address the reasonableness of Viacom's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Viacom has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration*, n.7 *infra*, the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Viacom implemented its CPS price under the new regulations. See para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

Procedural Matters

4. The first valid CPS complaint was completed and served on Viacom on December 17, 1993.[11] The Commission received the complaint on January 7, 1994.

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[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) ("*Second Order on Reconsideration*"); 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration* at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189, n.195.

[11] The Commission received an earlier complaint from the same complainant on November 26, 1993, but returned it pursuant to 47 C.F.R. § 76.954. The refiled complaint was dated December 17, 1993 and states that it was mailed to Viacom on that date. Viacom

5. Viacom attempted to justify its CPS price through an FCC Form 393 filed on December 27, 1993 in response to complainant's initial complaint. Viacom amended its justification twice: on February 2, 1994, then again on June 27, 1994 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally.[12] In addition, Viacom clarified by telephone that its August 10, 1994 response to a Commission letter about its related rate justification for Nashville, Tennessee (CUID No. TN0148) also applies to its Goodlettsville justification.[13]

Discussion

6. Viacom asserts that its monthly CPS tier price of $12.22 per subscriber is justified by its benchmark filing because its price is less than the maximum permitted charge of $12.32 as calculated in the filing. However, upon review we have determined that Viacom has not correctly calculated its maximum permitted price, and it is therefore appropriate to make the following adjustments to Viacom's calculations in Form 393:

a. Viacom's calculations for its rate-regulated package as of September 30, 1992 (Form 393, Part II, Worksheet 2) count channel 8 as a satellite channel. However, according to Viacom's August 10, 1994 Nashville amendment, channel 8 carried local broadcast station WDCN 16 hours per day and a satellite service only eight hours per day.

Our policy on "split" channels is to categorize them according to their preponderance of use. This policy is based on the fact that the 1992 price survey underlying the benchmark system was analyzed based on whole, not fractional, channel counts. Under the benchmark system in effect prior to May 15, 1994, all channels must be characterized as either rate-regulated or not subject to rate regulation and as either satellite or non-satellite. A "channel" is defined as a "unit of cable service identified and selected by a channel number or similar designation." FCC Form 393, p. 10. The preponderance-of-use test is the only one consistent with this conceptual framework. *See Questions and Answers on Cable Television Rate Regulation*, Q and A No. 1 (released June 1, 1994). We therefore adjust the number of 1992 regulated satellite channels from 25 to 24. This adjustment reduces the benchmark channel rate entered on Line 220 of Worksheet 2.

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has not complied with 47 C.F.R. § 76.956(a), which requires it to state when service occurred. Under these circumstances we will consider December 17, 1993 as the service date.

[12] *Cable Operators' Rate Justification Filings*, DA 94-526 (released May 23, 1994).

[13] This representation was memorialized in a letter from John B. Norton to Thomas F. Spike, Director, Financial Planning, Viacom Cable (Sep. 12, 1994), which was served on the complainant and the City of Goodlettsville.

b. Similarly, in its calculations in Form 393, Part II, Worksheet 1, Viacom treats channels 8, 14, 18 and 28 as satellite channels as of the initial date of regulation, although none carried rate-regulated satellite-delivered programming during the majority of programming hours. (Channel 8 carried local broadcast station WDCN 16 hours per day and rate-regulated satellite programming only eight; channel 14 carried local broadcast station WXMT 20 hours per day and rate-regulated satellite programming only four; channel 18 carried local access programming 12 hours per day and rate-regulated satellite programming the remaining 12; and channel 28 carried pay-per-view programming not subject to rate regulation 18 hours per day and rate-regulated satellite programming only six.) We therefore also adjust the number of satellite channels reflected in Worksheet 1 from 27 to 23, reducing the benchmark channel rate entered on Line 121 of Worksheet 1.

c. Viacom's calculations for its rate-regulated package as of the initial date of regulation (Form 393, Part I, and Form 393, Part II, Worksheet 1) count channel 28 as a rate-regulated channel in the CPS tier, although channel 28 carried pay-per-view programming not subject to rate regulation 18 hours per day and rate-regulated programming only six. For the same reason noted above, we therefore reduce the number of CPS-tier channels from 20 to 19.

d. In its amended filing of June 27, 1994, Viacom states that it calculated the Inflation Adjustment Factor (Form 393, Part II, Worksheet 1, Line 127, and Form 393, Part II, Worksheet 4, Line 401) using data it relied on when it set its $12.22 CPS price. If Viacom had done so correctly (i.e., if it had completed Form 393 with accurate data, including the most recent inflation data available as of the time it set its price), and if based on this data Form 393 indicated that its prices were reasonable, then Viacom would have successfully justified its prices under paragraph 94 of the *Third Order on Reconsideration*.[14] However, the errors described above are of such a magnitude that the $12.22 CPS price was excessive even when set.

Moreover, the figures Viacom used are not consistent with data on which it should have relied in setting its $12.22 CPS price. According to Viacom's August 10, 1994 Nashville amendment, Viacom calculated this price on August 22, 1993. Viacom used Gross National Product Price Index ("GNP-PI") data released by the U.S. Department of Commerce on August 31, 1993, to complete Lines 122 and 125, but used the figure available on August 22, 1993 rather than the August 31, 1993 figure to calculate the Inflation Factor on Line 123. Furthermore, Viacom claimed an Adjustment Time Period extending through November 1993 (Line 124), which is

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[14] *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, FCC 94-40, 9 FCC Rcd 4316 (1994) ("*Third Order on Reconsideration*").

inconsistent with an attempt to justify rates based on August 1993 data. Viacom's calculation of the Inflation Adjustment Factor is thus incorrect.[15]

We must therefore recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date as of which Viacom filed.[16] On its amended Form 393, Viacom entered 14 months on Line 124, indicating that its filing was as of the end of November 1993. On July 29, 1994, the Department of Commerce released corrected inflation data including GNP-PI figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through November 1993, the base date Viacom used in justifying its rates, of 1.032.

e. Viacom's August 10, 1994 Nashville amendment corrects the amount of deferred taxes reflected in Form 393, Part III, Schedule C, Column D. We incorporate this amendment to Column D (and subsequent steps) accordingly, thereby slightly increasing the maximum permitted price for CPS-tier programming service.

7. Because of these errors, we conclude that Viacom has failed to demonstrate that its price for the CPS tier was not unreasonable. We will therefore set a price for this tier, incorporating the adjustments discussed above. These adjustments have the cumulative effect of reducing the maximum permitted monthly CPS tier price from $12.[illegible]s Viacom calculated) to $11.70.

Conclusions

8. Upon review of the record herein, we conclude that Viacom Cable has demonstrated that $11.70 per month (plus franchise fee) was the maximum reasonable CPS tier price for the period January 7, 1994 to May 14, 1994.[17] We further determine that we

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[15] In its initial Form 393 filing, Viacom consistently calculated the Inflation Adjustment Factor through November 1993 using data that was released on August 31, 1993. However, Viacom abandoned this calculation when it made its June 27, 1994 amended filing. Furthermore, even if we were to accept Viacom's initial calculation, its CPS price would not be justified because of the errors in counting tier and satellite channels.

[16] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[17] This finding is based solely on the representations of Viacom listed in paragraph 5, *supra*, and the modifications described in paragraph 6, *supra*. Should information come to our attention that these representations (including representations as to data regarding installations and customer equipment) were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not

will order an appropriate refund pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amount they paid in excess of a reasonable price.

9. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the December 17, 1993 complaint against the cable programming service price charged by Viacom Cable in Goodlettsville, Tennessee, CUID No. TN0644, IS GRANTED TO THE EXTENT INDICATED HEREIN.

10. IT IS FURTHER ORDERED, that the benchmark filing submitted by Viacom Cable with respect to Goodlettsville, Tennessee, CUID No. TN0644, for the period of January 7, 1994 to May 14, 1994, justifies a maximum price of $11.70 per month (plus franchise fee) for Viacom Cable's cable programming service tier.

11. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Viacom Cable shall refund to subscribers that portion of the amounts paid for cable programming service from January 7, 1994[18] to May 14, 1994, that exceeded $11.70 (plus franchise fee) per month and was thus unreasonable, plus interest to the date of the refund.

12. IT IS FURTHER ORDERED, that Viacom Cable shall promptly determine the overcharges to CPS subscribers for the stated period, and shall within 21 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 30 days of Commission approval thereof.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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specifically addressed herein.

[18] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

DA 94-1440

In the matter of	)	
	)	
Withdrawal of FCC Form 329	)	MI0493 Village of Fowlerville
Complaints Against Horizon	)	MI1062 Village of Laingsburgh
Cablevision	)	MI1089 Grass Lake Township
	)	
Withdrawal of FCC Form 329	)	MI0020 City of Allegan
Complaints Against Mercom, Inc.	)	MI0035 Coldwater Township
	)	MI0036 City of Coldwater
	)	MI0103 Village of Quincy
	)	MI0180 City of Bronson
	)	MI0198 City of Plainwell
	)	MI0199 City of Otsego
	)	MI0529 Township of Ash
	)	MI1031 Village of Colon
	)	MI1069 Village of Blissfield
	)	MI1074 City of Petersburg

MEMORANDUM OPINION AND ORDER

Adopted: December 9, 1994 Released: December 12, 1994

By the Chief, Cable Services Bureau:

1. In each of the cases noted above, the local franchising authority (LFA) filed a complaint with this Commission alleging that the prices charged by Horizon Cablevision (Horizon) or Mercom, Inc. (Mercom) for cable programming tier (CPS) services in its community were unreasonably high. These complaints, and the local franchising authorities and filing dates, are noted at Attachment A. Between October 1 and November 10, 1994, many of these LFAs wrote to the Commission seeking to withdraw their CPS complaints.[1] In each case, the LFA was the only complainant who filed with this Commission. Our jurisdiction to regulate CPS rates arises with the filing of a valid complaint against those rates. The withdrawal of the only complaint against an operator's CPS rates in a community

[1] Some withdrawal letters were received prior to this four-week period; the dates of all withdrawal letters are noted in Attachment A.

constitutes the termination of our jurisdiction to regulate those rates. We will permit these complainants to withdraw their complaints, and our review of these filings will therefore be terminated.

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] In each case captioned above, Horizon Cablevision did file an FCC Form 393 benchmark rate justification submission, and Mercom filed either an FCC Form 393 benchmark rate justification submission, or a cost of service rate justification submission.

4. This Commission has now received from each of the captioned local franchising authorities a letter stating that it wished to withdraw its CPS rate complaint against Horizon

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[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] *See Second Order on Reconsideration* at 4119; 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration* at 4190, paras. 150-152.

[9] *Id.*

Cablevision or Mercom, Inc. Under our rules, this Commission's authority to regulate CPS cable rates arises when a valid complaint against those rates is filed. In each case noted here, the LFA is the only complainant against this operator in this community. Our mandate is to "protect subscribers of any cable system that is not subject to effective competition from rates that exceed the rates that would be charged if such a system were subject to effective competition."[10] While our rules forbid collusive agreements between operators and local franchising authorities regarding forebearance from rate regulation, there is no evidence of such an agreement here. In many of these letters, in fact, the LFA states that it has completed a rate review of the basic rates, and has found them reasonable. It is on the basis of this finding of reasonableness, rather than on the basis of an underlying agreement to forebear, that these LFAs are seeking to withdraw their CPS rate complaints. In light of this, we will grant these complainants permission to withdraw their complaints. Because our review of the rate justification showings is predicated on the existence of a rate complaint, and because these operators no longer face rate complaints in the above-noted communities, we are terminating our review of those filings.

5. Accordingly, IT IS ORDERED that permission to withdraw the FCC Form 329 rate complaints against cable programming service rates in the above-noted communities IS GRANTED, and the review of the resulting rate justification filings IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones

Meredith J. Jones
Chief, Cable Services Bureau

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[10] Conference Report on the Cable Act of 1992, at 62. *See also, Rate Order*, 8 FCC Rcd at 5669.

Attachment A

Horizon Cablevision CPS Complaint Withdrawals

CUID No., Local Franchising Authority	Complaints Filed[11]	Complaints Withdrawn
MI0493 Village of Fowlerville	10/8/93	10/31/94
MI1089 Grass Lake Township	10/29/93	11/1/94
MI1062 Village of Langsburgh	11/30/93	11/4/94

Mercom, Inc. CPS Complaint Withdrawals

MI0020 City of Allegan	11/29/93	9/30/94
MI0035 Coldwater Township	11/12/93	10/7/94
MI0036 City of Coldwater	11/11/93	9/27/94
MI0103 Village of Quincy	9/28/93	10/13/94
MI0180 City of Bronson	11/15/93	9/23/94
MI0198 City of Plainwell	11/12/93	10/11/94
MI0199 City of Otsego	11/11/93	10/5/94
MI0529 Township of Ash	2/11/94	10/12/94
MI1031 Village of Colon	11/12/93	10/12/94
MI1069 Village of Blissfield	11/16/93	10/11/94
MI1074 City of Petersburg	12/15/93	10/4/94

[11] The date given is the date the LFA first filed a complaint. In some cases, the LFAs filed duplicate complaints at later dates.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

DA 94-1441

In the matter of	)	
	)	
Withdrawal of FCC Form 329	)	MI0032 City of Cadillac
Complaints Against C-Tec Cable	)	MI0051 City of Manistee
Systems	)	MI0092 Filer Township
	)	MI0171 Village of Caro
	)	MI0281 City of Grayling
	)	MI0282 City of Frankfort
	)	MI0300 Eureka Township
	)	MI0344 Holland Charter Township
	)	MI0345 Park Township
	)	MI0371 City of Grand Haven
	)	MI0374 Springlake Township
	)	MI0381 City of Ionia
	)	MI0398 Whitewater Township
	)	MI0399 Milton Township
	)	MI0435 City of Zeeland
	)	MI0486 City of Coopersville
	)	MI0487 Allendale Township
	)	MI0497 City of Lake City
	)	MI0514 City of Manton
	)	MI0595 City of Wayland
	)	MI0596 Dorr Township
	)	MI0602 City of Durand
	)	MI0603 Village of Byron

MEMORANDUM OPINION AND ORDER

Adopted: December 9, 1994 Released: December 12, 1994

By the Chief, Cable Services Bureau:

1. In each of the cases noted above, the local franchising authority (LFA) filed a complaint with this Commission alleging that the prices charged by C-TEC Cable Systems (C-TEC) for cable programming service tier (CPS) services in its community were unreasonably high. These complaints, and the local franchising authorities and filing dates, are noted at Attachment A. Between September 20 and November 10, 1994, many of these LFAs wrote

to the Commission to withdraw their CPS complaints.[1] In each case, the LFA was the only complainant who filed with this Commission. Our jurisdiction to regulate CPS rates arises with the filing of a valid complaint against those rates. The withdrawal of the only complaint against an operator's CPS rates in a community constitutes the termination of our jurisdiction to regulate those rates. We will allow the withdrawal of these complaints, and our review of these filings will therefore be terminated.

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC

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[1] Some withdrawal letters were received prior to this four-week period; the dates of all withdrawal letters are noted in Attachment A.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] *See Second Order on Reconsideration* at 4119; 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration* at 4190, paras. 150-152.

Form 393.[9] In each case captioned above, C-TEC did file either an FCC Form 393 benchmark rate justification submission, or a cost of service rate justification submission.

4. This Commission has now received from each of the captioned local franchising authorities a letter stating that it wished to withdraw its CPS rate complaint against C-TEC. Under our rules, this Commission's authority to regulate CPS cable rates arises when a valid complaint against those rates is filed. In each case noted here, the LFA is the only complainant against this operator in this community. Our mandate is to "protect subscribers of any cable system that is not subject to effective competition from rates that exceed the rates that would be charged if such a system were subject to effective competition."[10] While our rules forbid collusive agreements between operators and local franchising authorities regarding forebearance from rate regulation, there is no evidence of such an agreement here. In many of these letters, in fact, the LFA states that it has completed a rate review of the basic rates, and has found them reasonable. It is on the basis of this finding of reasonableness, rather than on the basis of an underlying agreement to forebear, that these LFAs are seeking to withdraw their CPS rate complaints. We will accordingly allow these complainants to withdraw their complaints. Because our review of the rate justification showings is predicated on the existence of a rate complaint, and because these operators no longer face rate complaints in the above-noted communities, we are terminating our review of those filings.

5. Accordingly, IT IS ORDERED that permission to withdraw the FCC Form 329 rate complaints against cable programming service rates in the above-noted communities IS GRANTED, and the review of the resulting rate justification filings IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones

Meredith J. Jones
Chief, Cable Services Bureau

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[9] *Id.*

[10] Conference Report on the Cable Act of 1992, at 62. *See also, Rate Order*, 8 FCC Rcd at 5669.

Attachment A

C-TEC CPS Complaint Withdrawals

CUID No., Local Franchising Authority	Complaints Filed[11]	Complaints Withdrawn
MI0032 City of Cadillac	11/18/93	9/20/94
MI0051 City of Manistee	11/19/93	10/3/94
MI0092 Filer Township	3/17/94	10/10/94
MI0171 Village of Caro	11/10/93	10/11/94
MI0281 City of Grayling	11/12/93	9/27/94
MI0282 City of Frankfort	11/18/93	10/3/94
MI0300 Eureka Township	11/12/93	10/12/94
MI0344 Holland Charter Township	11/16/93	10/7/94
MI0345 Park Township	11/19/93	10/13/94
MI0371 City of Grand Haven	11/18/93	9/28/94
MI0374 Springlake Township	11/18/93	10/12/94
MI0381 City of Ionia	11/19/93	9/22/94
MI0398 Whitewater Township	12/9/93	10/11/94
MI0399 Milton Township	11/29/93	10/3/94
MI0435 City of Zeeland	12/1/93	9/20/94
MI0486 City of Coopersville	11/16/93	9/27/94

[11] The date given is the date the LFA first filed a complaint. In some cases, the LFAs filed duplicate complaints at later dates.

MI0487	Allendale Township	11/16/93	9/26/94
MI0497	City of Lake City	11/18/93	10/11/94
MI0514	City of Manton	11/18/93	10/10/94
MI0595	City of Wayland	11/18/93	9/20/94
MI0596	Dorr Township	11/18/93	10/19/94
MI0602	City of Durand	12/1/93	9/20/94
MI0603	Village of Byron	11/24/93	10/11/94

PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
1919 M STREET N.W.
WASHINGTON, D.C. 20554

News media information 202/632-5050. Recorded listing of releases and texts 202/632-0002.

DA 94-1442

December 13, 1994

WIRELESS TELECOMMUNICATIONS BUREAU ANNOUNCES SCHEDULE FOR IMPLEMENTATION OF FCC FORM 600

The Federal Communications Commission (FCC) has received an Emergency Petition for Stay from the National Association of Business and Educational Radio, Inc. (NABER) requesting that the Commission stay the January 2, 1995 effective date of the FCC Form 600. Several other parties, including the Utilities Telecommunications Council and the Association of Public-Safety Communications Officials, have submitted comments supporting the NABER petition. In response to the NABER petition, the Wireless Telecommunications Bureau is taking the following steps to ensure a smooth transition to use of the Form 600 for all mobile services applicants:

1. The effective date of the Form 600 remains January 2, 1995, as provided in the *Third Report and Order* in GN Docket No. 93-252. The Commission will begin accepting Form 600 applications on this date from all mobile services applicants who are eligible to use the form. (GMRS applicants will continue to use Form 574.)

2. For ninety (90) days after the effective date of the Form 600, *i.e.*, until April 2, 1995, applicants for mobile services other than Personal Communications Services (PCS) may submit applications on the form previously used for the service, *i.e.*, Form 401 or Form 574. Applicants who elect to file on the old forms during this transition period will be required to pay the application fee associated with the Form 600 for their particular service.

3. All applicants for narrowband and broadband PCS licenses filing "long form" applications on or after January 2, 1995 must do so on Form 600.

4. Beginning on April 3, 1995, the Commission will discontinue accepting Form 401 and Form 574 from all mobile service applicants (except for GMRS applicants) and will require all such applications to be filed on Form 600.

5. Applicants in the Business Radio, Specialized Mobile Radio, 220-222 MHz Land Mobile, and private paging services who elect to use the Form 574 during the 90-day transition period will be required to supplement the form with additional information from the Form 600 relating to the nature of their service for purposes of classification as Commercial Mobile Radio Service (CMRS) or Private Mobile Radio Service (PMRS). Applicants who are classified as PMRS on a "grandfathered" basis until August 10, 1996, must also provide this information for purposes of future reclassification. To fulfill this requirement, applicants must answer Questions 22 through 25 on the Form 600 main form and submit the main form as an attachment to the Form 574. (A sample of the Form 600 main form is attached to this Notice.) In addition, applicants in these services who will be classified as CMRS (whether immediately or after August 10, 1996) must answer and submit Questions 30 through 33 on the Form 600 main form relating to alien ownership.

6. Form 600 has received approval from the Office of Management and Budget and copies will be made available to the public shortly through the Forms Distribution Center (1-800-418-FORM) and the Commission's copy contractor, International Transcription Services, Inc. (202-857-3800). In addition, arrangements are being made include the form in the Commission's recently-created "fax-on-demand" program and to put the form on the Internet. Details concerning the availability of the form and how to obtain it will be provided by a subsequent Public Notice.

Action by Chief, Wireless Telecommunications Bureau.

For further information, contact the Customer Service Division, Federal Communications Commission, Gettysburg, PA 17325-7245, (800) 322-1117 or (717) 337-1212.

--FCC--

FCC 600
Main Form

FEDERAL COMMUNICATIONS COMMISSION

Approved by OMB 3060-0823 Expires 10/31/97 Est. Avg. Burden Hours Per Response: 4 Hrs.

FCC Use Only
(File Number)

Application for Mobile Radio Service Authorization
or Rural Radiotelephone Service Authorization

FEE Use Only

FILING FEE

(a) Fee Type Code	(b) Fee Multiple	(c) Fee Due for Fee Type Code in (a)	(d) Total Amount Due	FEE Use Only
			$	

APPLICANT

1. Legal Name of Applicant	2. Voice Telephone Number ( )	
3. Assumed Name Used for Doing Business (if any)	4. Fax Telephone Number ( )	
5. Mailing Street Address or P.O. Box ATTENTION:		
6. City	7. State	8. Zip Code

9. Name of Contact Representative (if other than applicant)	10. Voice Telephone Number ( )	
11. Firm or Company Name	12. Fax Telephone Number ( )	
13. Mailing Street Address or P.O. Box		
14. City	15. State	16. Zip Code

CLASSIFICATION OF FILING

17. This filing is a (an) [ ] New application Amendment to a pending application

18. Does the applicant believe that this filing should be classified as **MINOR** under 47 U.S.C. § 309? [ ] Yes No Does not apply

19. If not minor under 47 U.S.C. § 309, classification for purposes of competitive bidding: [ ] Initial Modification Renewal

20. If this filing is in reference to an existing station: **Call sign of existing station:**	21. If this filing is an amendment to a pending application: **File number of pending application:** **Date Filed:**

NATURE OF SERVICE

22. This filing is for authorization to provide or use the following type(s) of radio service:
[ ] Commercial mobile Private mobile Both commercial and private mobile Fixed

23. Users are or will be: [ ] Public subscribers Eligibles Internal		24. Status: [ ] Profit Not for profit
25. Interconnected service? [ ] Yes No	26. Radio Service code: [ ]	27. Type of operation code: [ ]

ENVIRONMENTAL POLICY

28. Would a Commission grant of any proposal in this application or amendment have a significant environmental effect as defined by 47 CFR 1.1307? • If "yes", attach environmental assessment as required by 47 CFR 1.1308 and 47 CFR 1.1311.	[ ]	Yes No

ALIEN OWNERSHIP

29. Is the applicant a foreign government or the representative of any foreign government?	[ ]	Yes No
30. Is the applicant an alien or the representative of an alien?	[ ]	Yes No
31. Is the applicant a corporation organized under the laws of any foreign government?	[ ]	Yes No
32. Is the applicant a corporation of which any officer or director is an alien or of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof or by any corporation organized under the laws of a foreign country?	[ ]	Yes No
33. Is the applicant a corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens, or of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country? • If "yes", attach exhibit explaining nature and extent of alien or foreign ownership or control.	[ ]	Yes No

BASIC QUALIFICATIONS

34. Has the applicant or any party to this application or amendment had any FCC station authorization, license or construction permit revoked or had any application for an initial, modification or renewal of FCC station authorization, license, construction permit denied by the Commission? • If "yes", attach exhibit explaining circumstances.	[ ]	Yes No
35. Has the applicant, or any party to this application or amendment, or any party directly or indirectly controlling the applicant ever been convicted of a felony by any state or federal court?	[ ]	Yes No
36. Has any court finally adjudged the applicant, or any person directly or indirectly controlling the applicant, guilty of unlawfully monopolizing or attempting unlawfully to monopolize radio communication, directly or indirectly, through control of manufacture or sale of radio apparatus, exclusive traffic arrangement or any other means or unfair methods of competition?	[ ]	Yes No
37. Is the applicant, or any person directly or indirectly controlling the applicant, currently a party in any pending matter referred to in the preceding two items?	[ ]	Yes No
38. Does the undersigned certify (by responding "Y" to this question), that neither the applicant nor any other party to the application is subject to a denial of Federal benefits that includes FCC benefits pursuant to Section 5301 of the Anti-Drug Abuse Act of 1988, 21 U.S.C. § 862, because of a conviction for possession or distribution of a controlled substance? • See 47 CFR 1.2002(b) for the meaning of "party to the application" for these purposes.	[ ]	Yes No

CERTIFICATION

The APPLICANT waives any claim to the use of any particular frequency or of the electromagnetic spectrum as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise, and requests an authorization in accordance with this application. The applicant certifies that grant of this application would not cause the applicant to be in violation of the spectrum aggregation limit in 47 CFR Part 20. All statements made in exhibits are a material part hereof and are incorporated herein as if set out in full in this application. The undersigned, individually and for the applicant, hereby certifies that all statements made in this application and in all attached exhibits are true, complete and correct to the best of his or her knowledge and belief, and are made in good faith.

39. Applicant is a (an) [ ] Individual Unincorporated Association Partnership Corporation Governmental Entity

40. Typed Name of Person Signing	41. Title
42. Signature	43. Date

WILLFUL FALSE STATEMENTS MADE ON THIS FORM ARE PUNISHABLE BY FINE AND/OR IMPRISONMENT (U.S.Code, Title 18, Section 1001), AND/OR REVOCATION OF ANY STATION LICENSE OR CONSTRUCTION PERMIT (U.S. Code, Title 47, Section 312(a)(1)), AND/OR FORFEITURE (U.S. Code, Title 47, Section 503).

FCC 94-314

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Reorganization and Revision of	)	
Parts 1, 2, 21, and 94 of	)	WT Docket No. 94-148
the Rules to Establish a New	)	
Part 101 Governing Terrestrial	)	
Microwave Fixed Radio Services	)	

NOTICE OF PROPOSED RULEMAKING

Adopted: December 9, 1994; Released: December 28, 1994

Comment Date: February 3, 1995
Reply Comment Date: February 21, 1995

By the Commission:

INTRODUCTION

1. By this action, the Commission proposes to simplify the rules for the common carrier and private operational fixed services, currently contained respectively in Parts 21 and 94 of the Commission's Rules, and to consolidate those rules into a new Part 101.[1] The key objectives in this Notice of Proposed Rulemaking (Notice) are to restructure the fixed microwave rules so that they are easier for the public to understand and use, to conform similar rule provisions to the maximum extent possible, to eliminate redundancy, and to remove obsolete language. We are also taking this opportunity to review the need for and impact of certain regulatory requirements and policies.

2. Common carrier microwave services and private operational fixed microwave

[1] We are not proposing to delete Part 21 in its entirety. As discussed below, the Multipoint Distribution Service Rules will remain in Part 21.

2. Common carrier microwave services and private operational fixed microwave services share many of the same frequency bands and use substantially the same equipment. As a result of recent changes that are discussed below, the interference standards, antenna standards, and coordination procedures for private and common carrier fixed microwave services have further converged. This rulemaking is an effort to conform filing, processing, operational, and technical requirements for services that are technically similar and, thereby, to gain significant economies and alleviate confusion to the public.

BACKGROUND

3. Communications services that use the microwave spectrum[2] for fixed services include common carriers (currently regulated by Part 21 of the FCC Rules), common carrier multiple address systems (Part 22)[3], broadcasters (Part 74), cable TV operators (Part 78), and private operational fixed users (currently regulated by Part 94). The radio frequency spectrum is allocated among these services on either a shared or an exclusive basis. When different service users have similar needs, they are sometimes required to share spectrum bands.

4. Of the services listed above, the common carrier and private operational fixed microwave users are the most similar in technical requirements and share the most frequency bands.[4] The convergence of the common carrier and private operational fixed microwave technical standards has occurred over the last decade as a result of several rulemaking proceedings.[5] Recently, a further convergence of these two services occurred as a result of

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[2] Microwave frequencies are loosely defined as those from about 1 GHz upward. IEEE Standard Dictionary of Electrical and Electronics Terms, (3d ed., F. Jay ed. 1984).

[3] Although there are similar fixed, point-to-multipoint services in both Parts 22 and 94, we are not proposing to move the point-to-multipoint regulations from Part 22 to Part 101 at this time. We are, however, proposing to move the current Part 94 rules, including the rules for point-to-multipoint services to Part 101. We are not proposing any modification of the rules for point-to-multipoint services in this proceeding, although we may propose updating and consolidating those rules in a future proceeding.

[4] The other types of services are not considered in this consolidation proceeding due to incompatible technical standards. Broadcasters and cable companies use mainly portable electronic news gathering (ENG) equipment that is technically incompatible with fixed microwave uses typically found in the common carrier and private services. Also not considered in this proceeding are the Instructional Television Fixed Service (ITFS) and the Multipoint Distribution Service (MDS). The ITFS and MDS services differ from the services to be included in Part 101 in terms of policy considerations, applicable rules, and technical standards.

[5] See First Report and Order in PR Docket No. 79-337, 81 FCC 2d 140 (1980); Second Report and Order in GEN Docket No. 79-188, 48 Fed. Reg. 50322 (1983); Third Report and Order in GEN Docket No. 82-334, 2 FCC Rcd. 1050, (1987); First Report and Order in GEN Docket No. 82-243, 6 FCC Rcd 4320 (1991); and First Report and Order in PR Docket No. 83-426, 50 Fed. Reg. 13338

the reallocation of five bands above 3 GHz on a co-primary basis to the common carrier and private operational fixed microwave licensees that are relocating from the 1850-1990, 2110-2150, and 2160-2200 MHz bands (2 GHz bands) to accommodate Personal Communications Services (PCS) and other emerging technologies.[6] Although the emerging technologies proceeding resolved all the technical issues necessary for this reallocation, there were other technical matters raised in the proceeding, which were not considered critical to the 2 GHz microwave users' relocation to other regions of the spectrum, that were left to be settled in a future proceeding.[7]

5. Also, as a result of the emerging technologies spectrum reallocation and the resulting increase in frequency band-sharing, common carrier and private microwave industry members have united to develop joint interference standards and coordination procedures. For over a year, a subcommittee of the Telecommunications Industry Association's Fixed Point-to-Point Microwave Engineering Committee (TIA TR14.11 Interference Criteria Engineering Subcommittee) has held joint meetings with the National Spectrum Managers Association (NSMA), a group of frequency coordinators for Part 21 applicants, to determine interference criteria for Part 21 and Part 94 users. This collaboration has resulted in a revised TIA Telecommunications Systems Bulletin TSB 10-F, "Interference Criteria for Microwave Systems," (TSB 10-F) which was adopted by the microwave industry on May 31, 1994. Representatives from both the TIA fixed microwave group and the NSMA have met with Commission staff to discuss the benefits of common technical standards, processing procedures, and consolidated rules for common carrier and private operational fixed microwave users.[8]

6. Another factor necessitating this proceeding is that the majority of the license application processing for the Part 21 and Part 94 microwave services is now being handled by the Wireless Telecommunications Bureau's Licensing Division in Gettysburg, Pennsylvania. Because the application processing for these services was formerly performed by different Commission offices, the processing practices and policies differed.[9] This proceeding seeks to bring uniformity to the fixed microwave application processing procedures.

(1985).

[6] See Second Report and Order in ET Docket No. 92-9, 8 FCC Rcd. 6495 (1993).

[7] See id., at 71-72.

[8] See Suggested Rule Changes for Merging Part 21 and Part 94 into Part 101, submitted by TIA on April 6, 1994, and letter from Robert J. Miller to Karen Rackley (May 2, 1994).

[9] See Public Notice, "New Application Processing Practices in the Common Carrier Point-to-Point Microwave and Broadcast Auxiliary Services," DA 93-77, January 27, 1993.

7. The Part 21 and Part 94 rules need to be consolidated, conformed, and updated to allow the microwave industry to operate as efficiently as possible without being hampered by obsolete regulations. Because of the commonality of major portions of the existing common carrier and private operational fixed microwave rules and the industry move to create common standards and coordination procedures, we believe it would be beneficial to consolidate these rules into one comprehensive part. At the same time, this proceeding provides us with an opportunity to improve the organization of the microwave rules, to simplify them, to eliminate unnecessary language, and to make other substantive amendments. We expect that a new consolidated Part 101 will result in major benefits. First, the public will benefit because of a much simplified and streamlined licensing process. Second, the improvements in processing efficiency will save scarce Commission resources and free staff time to improve service to the public. Third, we expect the proposed rules to encourage more efficient use of the microwave spectrum. Finally, common technical standards for common carrier and private microwave equipment may lead to economies of scale in microwave equipment production and, thus, lower equipment prices to users.

DISCUSSION

8. Proposed Part 101 is approximately 65 percent the volume of the current common carrier and private radio fixed microwave rules. This reduction results from the elimination of repetitive sections such as definitions, application procedures, and processing procedures, the elimination of unnecessary language, and the consolidation of the remaining rules. In the paragraphs below we address the proposed changes for each subpart and section of the rules, other than proposed changes that are editorial in nature or that concern only renumbering of existing rule language. Appendix B, entitled "Cross-Reference Index," shows the disposition of each existing rule in Parts 21 and 94.

9. We welcome comments on whether the scope of our consolidation effort is appropriate. We ask that comments identify the subject of their remarks, whenever possible, by citing the proposed section number of a rule (with cross-reference to the old rule as necessary). This identification will expedite and simplify our review of the comments on the many proposals contained in this Notice.

General Requirements

10. Definitions. We propose to make minor editorial changes in the definitions where appropriate. In instances where a definition now appears in more than one rule section and is phrased inconsistently, we propose to use the phrasing that we believe to be the most precise. In cases where a definition appears in Part 2 of the Rules as well as in another part, the proposed Part 101 definition adopts the Part 2 definition in order to conform with either the International Telecommunication Convention or the international Radio Regulations. Additionally, we propose to change the name and all relevant terms related to the Private Digital Termination System service to match the name and terms of the identical Common Carrier Digital Electronic Message Service. See proposed Section 101.3.

Applications and Licenses

11. General Application Requirements. We propose to eliminate several application showings that are currently required of common carrier microwave applicants under Part 21 of the rules, but which are not essential for processing these applications. We request comments on each of these proposals. First, we propose to eliminate the financial showing required under §§ 21.13(a)(2) and 21.17. Lack of financing has generally not been a problem in the common carrier services being transferred to Part 101, and we consider a certification of financial ability unnecessary in these services. Second, we propose eliminating the public interest showing required under § 21.13(a)(4). We tentatively conclude that the public interest will generally be served by granting applications in these services that meet all the Commission's other rules and requirements, and that a separate statement from the applicant pursuant to § 21.13(a)(4) is unnecessary. We also note that the Commission can still request a separate public interest showing if this is deemed necessary in any particular case. Third, we propose eliminating the requirement that applicants submit a copy of any franchise or other authorization when such authorizations are required by local law. See § 21.13(f). We request comments on whether we should replace this application showing with a rule, similar to that contained in Part 22 of the rules, stating that applicants must comply with all local franchise or authorization requirements, obtain any local authorizations by the end of the construction period, and notify the Commission if local authorization is denied. See § 22.13(f). Fourth, we propose eliminating showings regarding control over the station, see § 21.13(g), and maintenance procedures, see § 21.15(e). We request comments on whether we should replace these showings with a general rule describing a licensee's responsibilities for maintenance and control of the station and requiring that maintenance contracts must be in writing. See § 22.205. We also request comments on whether we should continue to require the address and telephone number of a maintenance center or person responsible for technical operation, see § 21.15(e)(1) and Item 18 of FCC Form 494 ("Application for New or Modified Microwave Radio Station License Under Part 21"), or whether this requirement is unnecessary and should also be deleted. Fifth, we propose to eliminate the vertical profile sketch, see § 21.15(c), and the site availability showing, see § 21.15(a), as these showings are not necessary for processing and lack of site availability has not been a problem in the common carrier services being transferred to Part 101. Sixth, we request comments on whether the public interest showing currently required of applicants in the Point-to-Point Microwave Radio Service pursuant to § 21.706(a) should be retained or deleted. We also propose to allow electronic filing for all fixed microwave services authorized under Part 101 as is currently allowed for private land mobile applications.[10] See proposed Sections 1.743, 1.913, and 101.37.[11] Finally, we request comments on what requirements we should adopt regarding retention or posting of the station license. See e.g. §§

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[10] See Order, "In the Matter of Amendment of the Commission's Rules to Modify Signature Requirement for License Applications in the Private Radio Services," 8 FCC Rcd. 2662 (1993).

[11] In a separate proceeding, the Commission proposed to allow Common Carrier Fixed Point-to-Point stations to begin construction upon filing of a license application, as long as certain conditions are met. Notice of Proposed Rulemaking, CC Docket No. 93-2, 8 FCC Rcd. 1112 (1993). This would allow the Common Carrier Point-to-Point Microwave Service benefits similar to those currently available to the private fixed microwave service. We are not duplicating the proposals of CC Docket No. 93-2 as we expect to complete that proceeding soon.

21.201, 22.201, and 94.107.

12. Licensee Qualifications and Consummation of Assignments and Transfers. Under Part 21, applicants and licensees are currently required to provide ownership and character information on FCC Form 430 ("Licensee Qualification Report"), see § 21.11(a), and to disclose the real party in interest behind the application pursuant to § 21.13(a)(1). See also § 21.305. We request comment on precisely what ownership (including partnership) and character information we should continue to require of common carrier applicants and licensees under the new Part 101. In addition, under § 21.11(d), (e), and (f), applicants are required to complete assignments or transfers of control within 45 days of the date of authorization and to notify the Commission within 10 days of consummation. In the common carrier services being transferred to Part 101, applicants frequently request extensions of time to complete assignments or transfers. Such requests are routinely granted. Based on this experience, we request comment on whether the time for consummation of assignments and transfers should be extended to 360 days or longer, or whether applicants should be allowed merely to notify the Commission of failure to consummate, rather than requiring applicants to file, and the Commission to grant, repeated extension requests. We also propose to eliminate the requirement for common carriers to notify the Commission within 10 days of consummation.

13. Commencing Operation. With regard to the requirement for stations to be placed in operation within a certain period after the date of grant, it has been common practice among some applicants to request and obtain a modification of their license and thereby obtain additional time within which to be in operation. Some applicants repeated this procedure several times, thereby extending their operational deadline far beyond the period contemplated by the rules. In response to these perceived abuses, the Commission's Private Radio Bureau Licensing Division issued a Public Notice[12] clarifying that a station must be placed in operation within the time required by current § 94.51 irrespective of whether the licensee had been granted an amendment to its station authorization. We propose to codify this longstanding interpretation of our rule. See proposed Section 101.63.

14. Although current § 94.51 requires that private fixed microwave stations be placed in operation within a time certain, it does not define what constitutes operation for purposes of the rules. In the past, several applicants have argued that the transmission of color bars[13] or other types of strictly test signals satisfies the rule's requirement of being in operation. This interpretation has been uniformly rejected by the staff. Applicants have also argued that the § 94.51 requirement of being in operation is satisfied as long as the station is simply capable of transmitting intelligence. The staff, however, has consistently informed the public

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[12] Public Notice, "Construction Requirement for Stations in the Private Operational Fixed Microwave Radio Service," Mimeo No. 4693, May 21, 1985. The functions of the Private Radio Bureau are now the responsibility of the Wireless Telecommunications Bureau.

[13] Color bars are a series of contiguous rectangles or patterns, each a different color. They are transmitted primarily for the purpose of testing and adjusting a television signal to ensure that the transmission path is functioning correctly.

that the mere capability of transmission does not satisfy the requirement of being in operation. We are proposing in Section 101.67(d) to make it clear that only the transmission of operational signals is sufficient to satisfy the "in operation" requirement and that neither the capability of transmission nor the transmission of color bars or similar test signals satisfies the requirement to be in operation. We are proposing to apply this requirement to both private and common carrier fixed microwave users, as the underlying basis for this proposal, efficient spectrum usage, applies equally to both groups. We request comment on whether this requirement is necessary or applicable for common carrier licensees under proposed Part 101.

Technical Standards

15. Frequency Availability Chart. A new frequency availability chart has been placed in the proposed rules (proposed Section 101.101) for the convenience of licensees and applicants. In addition to showing the frequency availability for private and common carrier users, it also shows other services, such as broadcast, cable, PCS, MDS, and ITFS, that share the same bands. More specific technical information for the common carrier and private microwave services are contained in rule Subparts G through J.

16. Coordination Procedures and Interference Standards. In the Second Report and Order in ET Docket 92-9, the Commission adopted the current Part 21 coordination procedures and the current Part 94 interference standards for the relocated common carrier and private operational fixed microwave users.[14] As stated above and in the Second Report and Order, the common carrier and private microwave industry members have united to develop joint interference standards and coordination procedures. We propose, therefore, to apply the same coordination procedures and interference standards to all bands for both private and common carrier fixed microwave services. In addition, we propose to modify the present coordination procedures and interference protection standards to be consistent with the TIA industry standards. See proposed Sections 101.103 and 101.105.

17. Transmitter Power Limitations. In addition to merging the transmitter power table from Parts 21 and 94, we also propose to eliminate the values for maximum allowable transmitter power, while retaining the values for Equivalent Isotropic Radiated Power (EIRP). See proposed Section 101.113. We are proposing to allow a maximum EIRP of + 55 dBW for all point-to-point microwave bands from 4 GHz to 40 GHz, to allow for increased path reliability on long paths and to set a common standard for all bands. See proposed Section 101.113. This proposal is based partly on TIA recommendations.[15] Comsearch also proposed a maximum allowable EIRP of +55 dBW in an earlier proceeding. Comsearch points out that in Part 25 of the Rules, the terrestrial station EIRP used to determine frequency coordination distance in the 4, 6, and 11 GHz bands is +55 dBW, which

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[14] See Second Report and Order in ET Docket No. 92-9, supra note 6, at 58-60.

[15] See Suggested Rule Changes, supra note 8.

corresponds with the International Telecommunications (ITU) Radio Rules and Regulations. [16] The Commission decided not to act on that portion of Comsearch's petition, instead deferring consideration of maximum authorized power, antenna standards, and ATPC to a future proceeding.[17] We seek comment on whether increasing the transmitter power limitations as proposed would have any negative impact on any radio users.

18. Automatic Transmitter Power Control. ATPC is a feature of digital microwave radio that automatically adjusts transmitter output power based on path fading detected at the far-end receiver(s).[18] In the emerging technologies/relocation proceeding, commenters proposed that ATPC should be explicitly authorized in the rules.[19] In response, the Commission clarified in the rules that ATPC is permitted up to a 3 dB increase in power and encouraged industry groups to explore in greater detail under what circumstances ATPC should be authorized and whether a greater increase in power than 3 dB would be appropriate.[20] We have reviewed the ATPC guidelines in TSB 10-F and are still uncertain of the necessity of including explicit provisions for its use in the rules. We seek comment on whether it is necessary to have TIA's recommendations for ATPC implementation included in our Rules. TSB 10-F contains provisions for up to three different power level specifications: maximum transmit power, coordinated transmit power, and nominal transmit power. We also seek comment on how these recommendations for ATPC should be implemented under our current licensing scheme, which authorizes only a single operating power level on each license, with that power being the one used in the coordination process. If the use of ATPC as described in TSB 10-F were to be permitted, what changes would the Commission have to make to its forms, licenses, and data base?

19. Antenna Standards. All antenna standards for Part 101 services have been consolidated into one rule section (proposed section 101.115). Few substantive changes to the antenna standards are proposed. In the Docket 92-9 proceeding, commenting parties raised concerns about our existing antenna standards, stating that the category A standards should be updated and that a new detailed definition of congested areas should be specified to maximize efficiency and permit full use of available bands.[21] The Commission does not have sufficient information at this time to propose specific changes to these standards.

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[16] See Petition for Clarification or Partial Reconsideration in ET Docket 92-9 filed by Comsearch on October 22, 1993.

[17] See Memorandum Opinion and Order in ET Docket 92-9, 9 FCC Rcd. 1943, at 29.

[18] See Section 4.3 of TSB 10-F for a detailed explanation of ATPC.

[19] See Second Report and Order in ET Docket No. 92-9, supra note 6, at 68-70.

[20] Id.

[21] See id. at 64.

Developmental Authorizations

20. We propose to eliminate the general requirement that applicants report on any patents applied for as a result of a developmental authorization. This information is in the public domain when the patent is granted, and our requirement is, therefore, duplicative. We also propose to modify the language concerning the confidentiality of developmental reports to make it consistent with our general rules on requests for confidentiality.[22] The consolidated rules continue the prohibition on providing service for hire with a developmental grant now placed on common carriers and extends the prohibition against commercial operation of a developmental grant to private radio operators.

CONCLUSION

21. In this Notice, we have proposed to amend the regulations for the common carrier and private operational fixed microwave services by consolidating and simplifying their present rule parts, contained respectively in Parts 21 and 94 of the Commission's Rules, to create a new Part 101. Our specific proposals are contained in the rules appendix. We solicit comment on them. We also invite comment on any additional changes that can make the Commission's microwave rules more "user friendly" and help the staff provide improved service to the public.

PROCEDURAL MATTERS

22. Initial Regulatory Flexibility Analysis. Pursuant to the Regulatory Flexibility Act of 1980, the Commission finds as follows:

A. Reason for Action

This rulemaking proceeding is initiated to obtain comment regarding consolidation and simplification of the microwave rules now contained in Parts 21 and 94 of Title 47 of the Code of Federal Regulations.

B. Objectives

This action would reduce redundancy now contained in the rules and remove obsolete rules and language. It would also simplify and clarify the requirements for filing license and other authorization applications, the processing of applications and other requests, and the operation of common carrier and private operational fixed microwave stations.

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[22] See Section 0.459, 47 C.F.R. § 0.459.

C. Legal Basis

The proposed action is authorized by Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r).

D. Description, Potential Impact, and Number of Small Entities Affected

This reorganization and revision of the common carrier and private operational fixed microwave rules will reduce the volume of the rules by approximately 25 percent and make them easier to use and understand. Both the reduction in volume and consolidation of the rules should improve their usefulness as they will be more easily understood by, and save research time for, the public. The benefits would accrue to all interested parties, large and small entities alike. We invite specific comment by interested parties on the likely magnitude of the impact on small radio manufactures and suppliers.

E. Reporting, Record Keeping, and Other Compliance Requirements

There should be an overall decrease in reporting, record keeping, and other compliance requirements. The use of electronic filing alone should greatly reduce the amount of paperwork required to be filed and increase speed of service.

F. Federal Rules that Overlap, Duplicate or Conflict with these Rules

None.

G. Significant Alternatives Minimizing Impact on Small Entities Consistent with Stated Objectives

The objective of this proceeding is to minimize confusion, research time, record keeping and recording for users of microwave radio frequencies. We are unaware of other alternatives that would be as desirable. We solicit comments on this point.

23. Other Matters. This is a non-restricted notice and comment rulemaking proceeding. Ex parte presentations are permitted, provided they are disclosed as provided in the Commission's rules. See generally 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

24. This action is taken pursuant to Section 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i) and 303(r).

25. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before #/February 3, 1995/#, and reply comments on or before #/February 21, 1995/#. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original

and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington D.C. 20554.

26. For further information concerning this rulemaking contact Robert James, (202) 634-1706, Wireless Telecommunications Bureau, Federal Communications Commission, Washington, D.C. 20554.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A – PROPOSED RULE CHANGES

I. PART 1 of Chapter 1 of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

PART 1 - PRACTICE AND PROCEDURE

1. The authority citation for Part 1 continues to read as follows:

Authority: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303; Implement, 5 U.S.C. 552 and 21 U.S.C. 853a, unless otherwise noted.

2. Section 1.77 is amended by adding a new paragraph (i) to read as follows:

§ 1.77 Detailed application procedures; cross references

* * * * *

(i) Rules governing applications for authorizations in the Common Carrier and Private Radio terrestrial microwave services are set out in Part 101.

* * * * *

3. Section 1.741 is amended by revising it to read as follows:

§ 1.741 Scope

The general rules relating to applications contained in §§ 1.742 through 1.748 apply to all applications filed by carriers except those filed by public correspondence radio stations pursuant to Parts 80, 87, and 101 of this chapter, and those filed by common carriers pursuant to Part 25 of this chapter. Parts 21 and 101 contain general rules applicable to applications filed pursuant to these Parts. For general rules applicable to applications filed pursuant to Parts 80 and 87, see such parts and Subpart F of this part. For rules applicable to applications filed pursuant to Part 25, see said part.

4. Section 1.743 is amended by revising paragraph (a) and adding a new paragraph (e) to read as follows:

§ 1.743 Who may sign applications.

(a) Except as provided in paragraph (b) of this section, applications, amendments thereto, and related statements of fact required by the Commission must be signed by the applicant, if the applicant is an individual; by one of the partners, if the applicant is a partnership; by an officer or duly authorized employee, if the applicant is a corporation; or by a member who is an officer, if the applicant is an unincorporated association. Applicants, amendments, and related statements of fact filed on behalf of eligible government entities, such as states and territories of the United States and political subdivisions thereof, the District of Columbia, and units of local government, including incorporated municipalities, must be signed by such duly elected or appointed officials as may be competent to do so under the laws of the applicable jurisdiction.

* * * * *

(e) "Signed," as used in this section, means an original hand-written signature, except that by public notice in the *Federal Register* the Commission may allow signature by any symbol executed or adopted by the applicant with the intent that such symbol be a signature, including symbols formed by computer-generated electronic impulses.

5. Section 1.761 is amended by revising it to read as follows:

§ 1.761 Cross reference

Specific types of applications under Title III of the Communications Act involving public correspondence radio stations are specified in Parts 23, 80, 87, and 101 of this chapter.

* * * * *

6. Section 1.825 is amended by revising paragraph (b) to read as follows:

§ 1.825 Random selection procedures for Digital Electronic Message Service.

* * * * *

(b) Petitions to deny applications for digital electronic message service authorizations, and responsive pleadings, shall be filed prior to conducting the random selection, pursuant to the requirements of § 101.43. Following the random selection, petitions against tentative selectee's applications shall be resolved by the Commission.

7. Section 1.901 is amended by revising it to read as follows:

§ 1.901 Scope.

In the case of any conflict between the rules set forth in this subpart and the rules set forth in part 13 or the rules set forth for specific services in parts 80 through 101, the rules in this subpart shall govern.

8. Section 1.924 is amended by revising paragraph (b)(2)(ii) to read as follows:

§ 1.924 Assignment or transfer of control, voluntary and involuntary.

(b)(2)(i) * * *

(b)(2)(ii) *FCC Form 402.* For assignment of station authorizations in the Private Operational Fixed Microwave Service (Part 101 of this chapter). Attached thereto shall be an executed Form 1046 or a signed letter from proposed assignor stating the assignor's desire to assign the current authorization in accordance with the rules governing the particular service involved.

(b)(2)(iii) * * *

9. Section 1.926 is amended by revising paragraph (a)(6) to read as follows:

§ 1.926 Application for renewal of license.

* * * * *

(a)(6) Renewal of station authorizations in the Private Operational Fixed Microwave Service (Part 101 of this chapter) shall be submitted on such form as the Commission may designate by the public notice in accordance with the provisions of § 101.13 of this chapter.

* * * * *

10. Section 1.972 is amended by revising paragraphs (a)(1) and (c) to read as follows:

§ 1.972 Grants by random selection.

(a) * * *

(1) For stations in the following Private Radio Services:
Part 80--Stations in the Maritime Services
Part 87--Aviation Services
Part 90--Private Land Mobile Services
Part 95--Subpart F--Personal Radio Services
Part 101--Subpart H--Private Operational Fixed Microwave Service.

(b) * * *

(c) If there are mutually exclusive applications for an initial license for stations subject to Part 80 or Part 87, or if there are more applications for an initial license in Part 90, Part 95-Subpart F, or Part 101- Subpart H, than can be accommodated on available frequencies, the Commission may process the applications pursuant to a system of random selection. Each such random selection shall be conducted pursuant to an order issued by the Private Radio Bureau and under the direction of the Chief of the Bureau.

* * * * *

II. Part 2 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 2 - Frequency Allocations and Radio Treaty Matters; General Rules and Regulations

1. The authority citation for Part 2 continues to read as follows:

Authority: Sec. 4, 302, 303, and 307 of the Communications Act of 1934, as amended, 47 U.S.C Sections 154, 302, 303, and 307, unless otherwise noted.

2. Section 2.995 is amended by revising paragraph (a)(2) to read as follows:

§ 2.995 Measurements required: Frequency stability.

* * * * *

(a)(2) From -20◦ to +50◦ centigrade for equipment to be licensed for use in the Maritime Services under Part 80 of this chapter, except Class A, B, and S Emergency Position Indicating

Radiobeacons (EPIRBS), and equipment to be licensed for use above 952 MHz at operational fixed stations in all services, stations in the Local Television Transmission Service and Point-to-Point Microwave Radio Service under Part 101 of this chapter, and equipment licensed for use aboard aircraft in the Aviation Services under Part 87 of this chapter.

* * * * *

III. Part 21 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 21 - DOMESTIC PUBLIC FIXED RADIO SERVICES

1. The authority citation for Part 21 continues to read as follows:

AUTHORITY Secs. 1, 2, 4, 201-205, 208, 215, 218, 303, 307, 313, 314, 403, 404, 410, 602; 48 Stat. as amended, 1064, 1066, 1070-1073, 1076, 1077, 1080, 1082, 1083, 1087, 1094, 1098, 1102; 47 U.S.C. 151, 154, 201-205, 208, 215, 218, 303, 307, 313, 314, 403, 404, 602; 47 U.S.C. 552.

2. Section 21.2 is amended to read as follows:

§ 21.2 Definitions.

As used in this part:

Antenna power gain. The square of the ratio of the root-mean-square free space field intensity produced at one mile in the horizontal plane, in millivolts per meter for one kilowatt antenna input power to 137.6 mV/m. This ratio should be expressed in decibels (dB). (If specified for a particular direction, antenna power gain is based on the field strength in that direction only.)

Antenna power input. The radio frequency peak or RMS power, as the case may be, supplied to the antenna from the antenna transmission line and its associated impedance matching network.

Antenna structures. The antenna, its supporting structure and anything attached to it.

Assigned frequency. The frequency coinciding with the center of the radio frequency channel in which the station is authorized to work. This frequency does not necessarily correspond to any frequency in an emission.

Authorized bandwidth. The maximum width of the band of frequencies permitted to be used by a station. This is normally considered to be the necessary or occupied bandwidth, whichever is greater.

Authorized frequency. The frequency assigned to a station by the Commission and specified in the instrument of authorization.

Authorized power. The maximum power a station is permitted to use. This power is specified by the Commission in the station's authorization.

Bandwidth occupied by an emission. The band of frequencies comprising 99 percent of the total radiated power extended to include any discrete frequency on which the power is at least 0.25 percent of the total radiated power.

Bit rate. The rate of transmission of information in binary (two state) form in bits per unit time.

Carrier. In a frequency stabilized system, the sinusoidal component of a modulated wave whose frequency is independent of the modulating wave; or the output of a transmitter when the modulating wave is made zero; or a wave generated at a point in the transmitting system and subsequently modulated by the signal; or a wave generated locally at the receiving terminal which when combined with the side bands in a suitable detector, produces the modulating wave.

Carrier frequency. The output of a transmitter when the modulating wave is made zero.

Communication common carrier. Any person engaged in rendering communication service for hire to the public.

Control point. A control point is an operating position at which an operator responsible for the operation of the transmitter is stationed and which is under the control and supervision of the licensee.

Control station. A fixed station whose transmissions are used to control automatically the emissions or operations of another radio station at a specified location, or to transmit automatically to an alarm center telemetering information relative to the operation of such station.

Coordination distance. For the purpose of this part, the expression "coordination distance" means the distance from an earth station, within which there is a possibility of the use of a given transmitting frequency at this earth station causing harmful interference to stations in the fixed or mobile service, sharing the same band, or of the use of a given frequency for reception at this earth station receiving harmful interference from such stations in the fixed or mobile service.

Digital modulation. The process by which some characteristic (frequency, phase, amplitude or combinations thereof) of a carrier frequency is varied in accordance with a digital signal, e.g. one consisting of coded pulses or states.

Domestic fixed public service. A fixed service, the stations of which are open to public correspondence, for radiocommunications originating and terminating solely at points all of which lie within: (a) the State of Alaska, or (b) the State of Hawaii, or (c) the contiguous 48 States and the District of Columbia, or (d) a single possession of the United States. Generally, in cases where service is afforded on frequencies above 72 MHz, radio-communications between the contiguous 48 States (including the District of Columbia) and Canada or Mexico, or radiocommunications between the State of Alaska and Canada, are deemed to be in the domestic fixed public service.

Domestic public radio services. The land mobile and domestic fixed public services the stations which are open to public correspondence.

Note: Part 80 of this chapter is applicable to the maritime services and fixed stations associated with the maritime services; Part 87 is applicable to aeronautical services.

Earth station. A station in the space service located either on the earth's surface, including on board a ship, or on board an aircraft.

Effective radiated power. The product of the antenna power input and the antenna power gain. This product should be expressed in watts. (If specified for a particular direction, effective radiated power is based on the antenna power gain in that direction only.)

Equivalent Isotropically Radiated Power (EIRP). The product of the power supplied to the transmitting antenna and the antenna gain in a given direction relative to an isotropic antenna radiator. This product may be expressed in watts or dB above 1 watt (dBW).

Facsimile. A system of telecommunication for the transmission of fixed images with a view to their reception in a permanent form.

Fixed earth station. An earth station intended to be used at a specified fixed point.

Fixed station. A station at a fixed location.

Frequency tolerance. The maximum permissible variation of the carrier frequency expressed as a percentage or in Hertz.

Harmful interference. Any radiation or any induction which endangers the functioning of a radionavigation service or of a safety service or obstructs or repeatedly interrupts a radio service.

Microwave frequencies. As used in this part, this term refers to frequencies of 890 MHz and above.

Multichannel multipoint distribution service. Those multipoint distribution service channels that use the frequency band 2596 MHz to 2644 MHz and associated response channels.

Multipoint distribution service. A one-way domestic public radio service rendered on microwave frequencies from a fixed station transmitting (usually in an omnidirectional pattern) to multiple receiving facilities located at fixed points.

Multipoint distribution service response station. A fixed station operated at an MDS receive location to provide communications with the associated station in the Multipoint Distribution Service.

Necessary bandwidth of emission. For a given class of emission, the width of the frequency band that is just sufficient to ensure the transmission of information at the rate and with the quality required under specified conditions.

Note: The necessary bandwidth for an emission may be calculated using the formulas in § 2.202 of this chapter.

Private line service. A service whereby facilities for communication between two or more designated points are set aside for the exclusive use or availability for use of a particular customer and authorized users during stated periods of time.

Public correspondence. Any telecommunication which the offices and stations, by reason of their being at the disposal of the public, must accept for transmission.

Radio station. A separate transmitter or a group of transmitters under simultaneous common control, including the accessory equipment required for carrying on a radiocommunication service.

Radiocommunication. Any telecommunication by means of hertzian waves.

Rated power output. The term "rated power output" of a transmitter means the normal radio frequency power output capability (Peak or Average Power) of a transmitter, under optimum conditions of adjustment and operation, specified by its manufacturer.

Record communication. Any transmission of intelligence which is reduced to visual record form at the point of reception.

Reference frequency. A frequency coinciding with or having a fixed and specified relation to the assigned frequency. This frequency does not necessarily correspond to any frequency in an emission.

Relay station. A fixed station used for the reception and retransmission of the signals of another station or stations.

Repeater station. A fixed station established for the automatic retransmission of radiocommunications received from one or more stations and directed to a specified receiver site.

Signal booster station. A low-power repeater station automatically retransmitting on the same frequency as the received signal, and located within the protected service area of a Multipoint Distribution Service station.

Standby transmitter. A transmitter installed and maintained for use in lieu of the main transmitter only during periods when the main transmitter is out of service for maintenance or repair.

Symbol rate. Modulation rate in bauds. This rate may be higher than the transmitted bit rate as in the case of coded pulses or lower as in the case of multilevel transmission.

Television. A system of telecommunication for transmission of transient images of fixed or moving objects.

Television STL station (studio transmitter link). A fixed station used for the transmission of television program material and related communications from a studio to the transmitter of a television broadcast station.

3. Section 21.3 is amended by deleting paragraph (b), and redesignating paragraph (c) as (b).

4. Section 21.6 is amended by revising paragraphs (b) and (c) to read as follows:

§ 21.6 Filing of applications, fees, and numbers of copies.

* * * * *

(b) Applications requiring fees as set forth at part 1, subpart G of this chapter must be filed in accordance with Sec. 0.401(b) of this chapter. Applications not requiring fees shall be submitted to: Federal Communications Commission, Washington, DC 20554.

(c) All correspondence or amendments concerning a submitted application shall clearly identify the radio service, the name of the applicant, station location, and the Commission file number (if

known) or station call sign of the application involved. All correspondence or amendments concerning a submitted application may be sent directly to the Common Carrier Bureau.

* * * * *

5. Section 21.13 is amended by deleting paragraph (f), redesignating paragraph (g) as (f), and revising paragraphs (a)(6) and (b) to read as follows:

§ 21.13 General application requirements.

(a) * * *

(6) Show compliance with the special requirements applicable to each radio service and make all special showings that may be applicable (e.g., those required by Secs. 21.900, 21.912 and 21.913 of this part, etc.).

(b) Applications may cross-reference previously filed material where documents, exhibits or other lengthy showings already on file with the Commission contain information which is required by an application form and may specifically refer to such information, if:

* * * * *

6. Section 21.15 is amended by revising the introductory paragraph, and paragraphs (c), (d), and (g) to read as follows:

§ 21.15 Technical content of applications.

Applications shall contain all technical information required by the application form and any additional information necessary to fully describe the proposed facilities and to demonstrate compliance with all technical requirements of the rules governing the radio service involved (see Subparts C, F and K as appropriate). The following paragraphs describe a number of technical requirements.

(a) * * *

(b) * * *

(c) Each application involving a new or modified transmitting antenna supporting structure, passive facility, or signal booster station, the addition or removal of a transmitting antenna, or the repositioning of an authorized antenna for a station must be accompanied by a vertical profile sketch of the total structure depicting its structural nature and clearly indicating the ground elevation (above sea level) at the structure site, the overall height of the structure above ground (including obstruction lights when required, lightning rods, etc.) and, if mounted on a building, its overall height above the building. The proposed antenna on the structure must be clearly identified and its height above-ground (measured to the center of radiation) clearly indicated.

(d) Each application proposing a new or modified antenna structure for a station (including a passive repeater or signal booster station) so as to change its overall height shall indicate whether any necessary notification of the FAA has been made. Complete information as to rules concerning the construction, marking and lighting of antenna structures is contained in Part 17 of this chapter. See also Sec. 21.111 if the structure is used by more than one station.

(e) * * *

(f) * * *

(g) Each application in the Multipoint Distribution Service proposing a new or replacement directional antenna shall include an antenna radiation pattern showing the antenna power gain distribution in the horizontal plane expressed in decibels, unless such pattern is known to be on file with the Commission in which case the applicant may reference in its application the

FCC-ID number that indicates that the pattern is on file with the Commission.

7. Section 21.20 is amended by revising (b)(5) to read as follows:

§ 21.20 Defective applications.

* * * * *

(b) * * *
(5) The application does not certify the availability of the proposed station site.

* * * * *

8. Section 21.23 is amended by deleting paragraphs (c)(1) and (d), redesignating (c)(2) through (c)(7) as (c)(1) through (c)(6), redesignating (e) through (g) as (d) through (f), and revising the newly redesignated paragraphs (c)(1) and (d)(1) to read as follows:

§ 21.23 Amendment of applications.

* * * * *

(c) * * *
(1) If in the Multipoint Distribution Service, the amendment results in a substantial modification of the engineering proposal such as (but not necessarily limited to):

* * * * *

(d) * * *
(1) Any applicant whose application appears on its face to be mutually exclusive with the application being amended, including those applicants originally served under Sec. 21.902;

* * * * *

9. Section 21.31 is amended by deleting paragraph (f), and revising paragraph (e)(3) to read as follows:

§ 21.31 Mutually exclusive applications.

* * * * *

(e) * * *
(3) The amendment reflects only a change in ownership or control found by the Commission to be in the public interest, and for which a requested exemption from the "cut-off" requirements of this section is granted, unless the amendment is for more than a pro forma change of ownership or control(bankruptcy, death or legal disability) of a pending Multipoint Distribution Service application in which event the application will be dismissed;

* * * * *

10. Section 21.33 is amended by deleting paragraph (a), and redesignating paragraph (b) through (d) as (a) through (c).

11. Section 21.39 is amended by revising paragraph (d)(3) to read as follows:

§ 21.39 Considerations involving transfer or assignment applications.

* * * * *

(d) * * *

(3) The median date of the applicable commencement dates (determined pursuant to paragraphs (c) (1) and (2) of this section) if the transaction involves two or more stations. (The median date is that date so selected such that fifty percent of the commencement dates of the total number of stations, when arranged in chronological order, lie below it and fifty percent lie above it. When the number of stations is an even number, the median date will be a value half way between the two dates closest to the theoretical median).

* * * * *

12. Section 21.41 is amended by revising paragraphs (b) and (c) to read as follows:

§ 21.41 Special processing of applications for minor facility modifications.

* * * * *

(b) An application may be considered under the procedures of this section only if:

(1) It is in the Multipoint Distribution Service;

(2) The cumulative effect of all such applications made within any 60 days period does not exceed the appropriate values prescribed by paragraph (c) of this section;

(3) The facilities to be modified are not located within 56.3 kilometers (35 miles) of the Canadian or Mexican border;

(4) It is acceptable for filing, is consistent with all of the Commission's rules, and does not involve a waiver request;

(5) It specifically requests consideration pursuant to this section; and

(6) Frequency coordination procedures are complied with and a copy of the application has been served on those who also were served under Sec. 21.902.

(c) The modifications that may be authorized under the procedures of this section are:

(1) Changes in a transmitter and existing transmitter operating characteristics, or protective configuration of transmitter, provided that:

(i) In the Multipoint Distribution Service, any increase in EIRP is one and one-half dB or less over the previously-authorized power value.

(ii) The necessary bandwidth is not increased by more than 10% of the previously authorized necessary bandwidth;

(2) Changes in the height of an antenna, provided that:

(i) In Multipoint Distribution Service, any increase in antenna height is less than 3.0 meters (10 feet) above the previously authorized height; and

(ii) The overall height of the antenna structure is not increased as a result of the antenna

extending above the height of the previously authorized structure, except when the new height of the antenna structure is 6.1 meters (20 feet) or less (above ground or man-made structure, as appropriate) after the change is made.

(3) Change in the geographical coordinates of a transmit station by ten seconds or less of latitude, longitude or both, provided that when notice to the FAA of proposed construction is required by Part 17 of the rules for antenna structure at the previously authorized coordinates (or will be required at the new location) the applicant must comply with the provisions of § 21.15(d).

(4) An increase in the number of Digital Termination user stations.

* * * * *

13. Section 21.42 is amended by deleting paragraph (c)(7), redesignating paragraph (c)(8) as (c)(7), and revising paragraphs (b) and (c)(3) to read as follows:

§ 21.42 Certain modifications not requiring prior authorization.

* * * * *

(b) Licensees of fixed stations in the Multipoint Distribution Service may make the facility changes listed in paragraph (c) of this section without obtaining prior Commission authorization, if:

(1) The Multipoint Distribution Service licensee serves a copy of the notification described in (b)(3) on those who were served under Sec. 21.902, and

(2) * * *

(3) * * *

(c) * * *

(3) Change to an antenna (other than any change involving a periscope antenna system), when the new antenna conforms with Sec. 21.906 and the gain of the new antenna does not exceed that of the previously authorized antenna by more than one dB in any direction.

* * * * *

14. Section 21.43 is amended by revising paragraph (a) to read as follows:

§ 21.43 Period of construction; certification of completion of construction.

(a) Each license for a radio station for the services included in this Part shall specify as a condition therein the period during which construction of facilities will be completed and the station made ready for operation. Construction may not commence until the grant of a license, and must be completed by the date specified in the license as the termination date of the construction period. Except as may be limited by Sec. 21.45(b) or otherwise determined by the Commission for any particular application, the maximum construction period for all stations licensed under this Part shall be a maximum of 12 months from the date of the license grant.

* * * * *

15. Section 21.45 is amended by revising paragraphs (a) and (c) to read as follows:

§ 21.45 License period.

(a) Licenses for stations in the Multipoint Distribution Service will be issued for a period not to exceed 10 years, except that licenses for developmental stations will be issued for a period not to exceed one year. The expiration date of developmental licenses shall be one year from the date of the grant thereof. Unless otherwise specified by the Commission, the expiration of regular licenses shall be on the following date in the year of expiration.

Multipoint Distribution Service–May 1.

When a license is granted subsequent to the last renewal date of the class of license involved, the license shall be issued only for the unexpired period of the current license term of such class.

(b) * * *

(c) Upon the expiration or termination of any station license, any related conditional authorization, which bears a later expiration date, shall be automatically terminated concurrently with the related station license, unless it shall have been determined by the Commission that the public interest, convenience or necessity would be served by continuing in effect said conditional authorization.

16. Section 21.100 is amended by deleting paragraphs (b) through (e) and deleting the "(a)" designation from the beginning of paragraph (a).

17. Section 21.101 is amended by deleting paragraph (b), redesignating paragraph (c) as (b), and revising paragraph (a) to read as follows:

§ 21.101 Frequency tolerance.

(a) The carrier frequency of each transmitter authorized in these services shall be maintained within the following percentage of the reference frequency except as otherwise provided in paragraph (b) of this section or in the applicable subpart of this part (unless otherwise specified in the instrument of station authorization the reference frequency shall be deemed to be the assigned frequency):

Frequency range (MHz)	Frequency tolerance for fixed stations (percent)
2,150 to 2,162 /1/ /2/	0.001
2,500 to 2,686 /2/	0.005

/1/ Beginning Aug. 9, 1975, this tolerance will govern the marketing of equipment pursuant to Sec 2.803 and 2.805 of this chapter and the issuance of all authorizations for new radio equipment. Until that date new equipment may be authorized with a frequency tolerance of .03 percent in the frequency range 2,200 to 10,500 MHz and equipment so authorized may continue to be used for its life provided that it does not cause interference to the operation of any other licensee. Equipment authorized in the frequency range 2,450 to 10,500 MHz prior to

June 23, 1969, at a tolerance of .05 percent may continue to be used until February 1, 1976 provided it does not cause interference to the operation of any other licensee.

/2/ Beginning November 1, 1991, equipment authorized to be operated in the frequency bands 2150-2162 MHz, 2596-2644 MHz, 2650-2656 MHz, 2662-2668 MHz, and 2674-2680 MHz for use in the Multipoint Distribution Service shall maintain a frequency tolerance within +/-1 KHz of the assigned frequency.

* * * * *

18. Section 21.106 is amended by deleting paragraphs (a)(3) and (a)(4).

19. Section 21.107 is amended by revising paragraph (b) to read as follows:

§ 21.107 Transmitter power.

* * * * *

(b) The rated power of a transmitter employed in these radio services shall not exceed the values shown in the following tabulation:

Frequency Band (MHz)	Maximum allowable transmitter power for a fixed station (Watts)	Maximum allowable EIRP for a fixed station (dBW)
2,150 to 2,162	100.0	2000/1/
2,500 to 2,686	100.0	2000/1/

/1/ When a Multipoint Distribution Service station uses a non-omnidirectional antenna EIRP up to 7943 Watts may be authorized pursuant to Sec. 21.904(b) of this Part.

* * * * *

20. Section 21.108 is amended to read as follows:

§ 21.108 Antennas.

Where a station communicates with more than one point, a multi- or omni-directional antenna may be authorized if necessary.

21. Section 21.109 is amended by revising paragraph (b) to read as follows:

§ 21.109 Antenna and antenna structures.

* * * * *

(b) The Commission may require the replacement, at the licensee's expense, of any antenna system of a permanent fixed station operating at 2500 MHz or higher upon a showing that said antenna causes or is likely to cause interference to any other authorized or proposed station.

22. Section 21.114 is amended by deleting the title and text, and designating the Section "[Reserved]" as follows:

§ 21.114 [Reserved]

23. Section 21.119 is amended by deleting the title and text, and designating the Section "[Reserved]" as follows:

§ 21.119 [Reserved]

24. Section 21.120 is amended by deleting paragraphs (d) and (e), and revising paragraph (a) to read as follows:

§ 21.120 Authorization of transmitters.

(a) Except for transmitters used at developmental stations, each transmitter shall be a type which has been type accepted by the Commission for use under the applicable rules of this part.

* * * * *

25. Section 21.122 is amended by deleting paragraphs (a)(2) through (a)(5), (d) and (e), and revising paragraph (a) to read as follows:

§ 21.122 Microwave digital modulation.

(a) Microwave transmitters employing digital modulation techniques and operating below 15 GHz shall, with appropriate multiplex equipment, comply with the following additional requirement: The bit rate, in bits per second, shall be equal to or greater than the bandwidth specified by the emission designator in Hertz (e.g., to be acceptable, equipment transmitting at a 20 Mb/s rate must not require a bandwidth of greater than 20 MHz), except the bandwidth used to calculate the minimum rate shall not include any authorized guard band.

* * * * *

26. Sections 21.212 through 21.214 are deleted.

27. Section 21.303 is amended by revising paragraphs (a) through (c) and (d)(1) to read as follows:

§ 21.303 Discontinuance, reduction or impairment of service.

(a) If the public communication service provided by a station in the Domestic Public Radio Services is involuntarily discontinued, reduced or impaired for a period exceeding 48 hours, the station licensee shall promptly give notification thereof in writing to the Commission at Washington, DC 20554. In every such case, the licensee shall furnish full particulars as to the

reasons for such discontinuance, reduction or impairment of service, including a statement as to when normal service is expected to be resumed. When normal service is resumed, prompt notification thereof shall be given in writing to the Commission at Washington, DC 20554.

(b) No station licensee subject to title II of the Communications Act of 1934, as amended, shall voluntarily discontinue, reduce or impair public communication service to a community or part of a community without obtaining prior authorization from the Commission pursuant to the procedures set forth in part 63 of this chapter or complying with the requirements set forth at Sec. 21.910. In the event that permanent discontinuance of service is authorized by the Commission, the station licensee shall promptly send the station license to the Commission for cancellation at Washington, DC 20554, except that Multipoint Distribution Service station licenses need not be surrendered for cancellation if the discontinuance is a result of a change of status by a Multipoint Distribution Service licensee from common carrier to non-common carrier pursuant to Sec. 21.910.

(c) Any station licensee, not subject to title II of the Communications Act of 1934, as amended, who voluntarily discontinues, reduces or impairs public communication service to a community or a part of a community shall give written notification to the Commission within 7 days thereof. In the event of permanent discontinuance of service, the station licensee shall promptly send the station license to the Commission for cancellation at Washington, DC 20554, except that Multipoint Distribution Service station licenses need not be surrendered for cancellation if the discontinuance is a result of a change of status by a Multipoint Distribution Service licensee from non-common carrier to common carrier.

(d) * * *

(1) Submit for cancellation the station license (or licenses) to the Commission at Washington, DC 20554.

* * * * *

28. Subpart G of Part 21 is revised by deleting the title, deleting Sections 21.500 through 21.512, and designating the Subpart "[Reserved]" as follows:

Subpart G - [Reserved]

29. Subpart I of Part 21 is revised by deleting the title, deleting Sections 21.700 through 21.713, and designating the Subpart "[Reserved]" as follows:

Subpart I - [Reserved]

30. Subpart J of Part 21 is revised by deleting the title, deleting Sections 21.800 through 21.809, and designating the Subpart "[Reserved]" as follows:

Subpart J - [Reserved]

31. Section 21.901 is amended by revising paragraphs (a) and (e) to read as follows:

§ 21.901 Frequencies.

(a) Frequencies in the bands 2150-2162 MHz, 2596-2644 MHz, 2650-2656 MHz, 2662-2668 MHz, and 2674-2680 MHz are available for assignment to fixed stations in this service. Frequencies in the band 2150-2160 MHz are shared with non-broadcast omnidirectional radio systems licensed under other parts of the Commission's Rules, and frequencies in the band 2160-2162 MHz are shared with directional radio systems authorized

in other common carrier services. Frequencies in the 2596-2644 MHz band are shared with Instructional Television Fixed Service Stations licensed under Part 74 of the Commission's Rules. The response channels E1, E2, F1, and F2 listed in Sec. 74.939(d) of this chapter are grandfathered for fixed stations in this band and are shared with Instructional Television Fixed Service Stations licensed under part 74 of the Commission's rules; the existing response channels E3, E4, F3, and F4 listed in Sec. 74.939(d) of this chapter are grandfathered and licensed under this part 21.

* * * * *

(e) Frequencies in the band segments 18,580-18,820 MHz and 18,920-19,160 MHz are available for assignment to fixed stations in this service for a point-to-point return links from a subscriber's location. Assignments in the 18 GHz band for these return links will be made in accordance with the provisions of Subpart I of Part 101.

* * * * *

32. Section 21.902 is amended by revising paragraphs (c)(1)(ii), (c)(2)(i), (c)(2)(ii) and (f)(3) to read as follows:

§ 21.902 Frequency interference.

* * * * *

(c) * * *

(ii) if the great circle path between the applicant's proposed transmitter and the protected service area of any authorized, or previously-proposed, cochannel or adjacent-channel station(s) is within 241.41 km (150 miles) or less and 90 percent or more of the path is over water or within 16.1 km (10 miles) of the coast or shoreline of the Atlantic Ocean, the Pacific Ocean, the Gulf of Mexico, any of the Great Lakes, or any bay associated with any of the above (see Secs. 21.901(a) and 74.902 of this chapter);

(2)(i) One map, folded to an 8 1/2 x 11 inch (21.6 cm x 27.9 cm) size, identifying the boundaries of the protected service areas of each authorized or previously-proposed cochannel station with transmitter site coordinates within 160.94 km (100 miles) of the coordinates of the applicant's proposed transmitter site, and the 45 dB desired signal to undesired signal contour line of the applicant's proposed MDS station for cochannel stations; and

(ii) A second map, folded to an 8 1/2 x 11 inch (21.6 cm x 27.9 cm) size, identifying the boundaries of the protected service areas of each authorized or previously-proposed adjacent-channel station with transmitter site coordinates within 160.94 km (100 miles) of the coordinate of the applicant's proposed transmitter site, and the 0 dB desired signal to undesired signal contour line of the applicant's proposed MDS station for adjacent-channel stations (see 47 CFR 21.902(d));

* * * * *

(f) * * *

(3) For purposes of this section all interference calculations involving receive antenna performance shall use the reference antenna characteristics shown in figure 1.

[...Illustration appears here...]

Figure I. Radiation Pattern Envelope for Reference Receive Antenna
(21.902 (f)(3))

* * * * *

33. Section 21.903 is amended by revising paragraph (a) to read as follows:

§ 21.903 Purpose and permissible service.

(a) Multipoint Distribution Service stations are generally intended to provide one-way radio transmission (usually in an omnidirectional pattern) from a stationary transmitter to multiple receiving facilities located at fixed points. When service is provided on a common carrier basis, subscriber supplied information is transmitted to points designated by the subscriber. When service is provided on a non-common carrier basis, transmissions may include information originated by persons other than the licensee, licensee- manipulated information supplied by other persons, or information originated by the licensee. Point-to-point radio return links from a subscriber's location to a MDS operator's facilities may be authorized in the 18,580 through 18,820 MHz and 18,920 through 19,160 MHz bands. Rules governing such operation are contained in Subpart I of Part 101, the Point-to-Point Microwave Radio Service.

* * * * *

IV. Part 94 of Chapter 1 of Title 47 of the Code of Federal Regulations is removed and reserved for future use.

V. Part 101 of Chapter 1 of Title 47 of the Code of Federal Regulations is added to read as follows:

PART 101

FIXED MICROWAVE SERVICES

Subpart A--General

Sec.

101.1 Scope and authority.
101.3 Definitions.

Subpart B--Applications and Licenses

General Filing Requirements

101.5 Station authorization required.
101.7 Eligibility for station license.
101.9 Formal and informal applications.
101.11 Filing of applications, fees, and number of copies.

101.13 Application forms and requirements for private operational fixed stations.
101.15 Application forms for common carrier fixed stations. licenses.
101.17 [Reserved]
101.19 General application requirements.
101.21 Technical content of applications.
101.23 Waiver of rules.
101.25 Inconsistent or conflicting applications.
101.27 Repetitious applications.
101.29 Amendment of pending applications.
101.31 Special temporary authority.
101.33 Who may sign applications.

Processing of Applications

101.35 Preliminary processing of applications.
101.37 Public notice period.
101.39 Dismissal and return of applications.
101.41 Ownership changes and agreements to amend or dismiss applications or pleadings.
101.43 Opposition to applications.
101.45 Mutually exclusive applications.
101.47 Consideration of applications.
101.49 Grants by random selection.
101.51 Comparative evaluation of mutually exclusive applications.

License Transfers, Modifications, Conditions and Forfeitures

101.53 Assignment or transfer of station authorization.
101.55 Considerations involving transfer or assignment applications.
101.57 Modification of station license.
101.59 Processing of applications for facility minor modifications.
101.61 Certain modifications not requiring prior authorization.
101.63 Period of construction; certification of completion of construction.
101.65 Forfeiture and termination of station authorizations.
101.67 License period.
101.69 Transition of the 2.11-2.13 and 2.16-2.18 GHz bands from Common Carrier Fixed Radio Services and the 1.85-1.99, 2.13-2.15, and 2.18-2.20 GHz bands from Private Operational Fixed Microwave Radio Service to emerging technologies.

Subpart C--Technical Standards

101.101 Frequency availability.
101.103 Frequency coordination procedures.
101.105 Interference protection criteria.
101.107 Frequency tolerance.
101.109 Bandwidth.
101.111 Emission limitations.
101.113 Transmitter power.

101.115 Directional antennas.
101.117 Antenna polarization.
101.119 Simultaneous use of common antenna structures.
101.121 Marking of antenna structures.
101.123 Quiet zones.
101.125 Temporary fixed antenna height restrictions.
101.127 Topographical data.
101.129 Transmitter location.
101.131 Transmitter construction and installation.
101.133 Limitations on use of transmitters.
101.135 Shared use of radio stations and the offering of private carrier service.
101.137 Interconnection of private operational fixed microwave stations.
101.139 Authorization of transmitters.
101.141 Microwave digital modulation.
101.143 Minimum path lengths for fixed links.
101.145 Interference to geostationary-satellites.

Subpart D–Technical Operation

101.201 Station inspection.
101.203 Communications concerning safety of life and property.
101.205 Operation during emergency.
101.207 Suspension of transmission.
101.209 Operation of stations at temporary fixed locations for communication between the United States and Canada or Mexico.
101.211 Operator requirements for private operational fixed stations.
101.213 Station identification.

Subpart E–Miscellaneous

101.301 National defense; free service.
101.303 Answers to notices of violation.
101.305 Discontinuance, reduction or impairment of service.
101.307 Tariffs, reports, and other material required to be submitted to the Commission.
101.309 Requirement that licensees respond to official communications.
101.311 Equal employment opportunities.

Subpart F–Developmental Authorizations

101.401 Eligibility.
101.403 Scope of service.
101.405 Adherence to program of research and development.
101.407 Special procedure for the development of a new service or for the use of frequencies not in accordance with the provisions of the rules in this part.
101.409 Terms of grant; general limitations.
101.411 Supplementary showing required.
101.413 Developmental report required.

Subpart G—Digital Electronic Message Service

101.501	Eligibility.
101.503	Digital termination nodal stations.
101.505	Frequencies.
101.507	Frequency stability.
101.509	Interference protection criteria.
101.511	Purpose and permissible service.
101.513	Transmitter power.
101.515	Emissions and bandwidth.
101.517	Antennas.
101.519	Interconnection.
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Subpart H—Private Operational Fixed Microwave Service

101.601	Eligibility.
101.603	Permissible communications.
101.605	Frequencies.
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Subpart I—Point-to-Point Microwave Radio Service

101.701	Eligibility.
101.703	Frequencies.
101.705	Transmitter power.
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101.709	Modulation requirements.
101.711	Permissible communications.
101.713	Supplementary showing required with applications.
101.715	Stations at temporary fixed locations.
101.717	Notification of station operation at temporary fixed locations.
101.719	Renewal of station licenses.
101.721	Channel loading.
101.723	Special requirements for operation in the band 38.600-40.000 MHz.

Subpart J—Local Television Transmission Service

101.800	Eligibility.
101.801	Frequencies.
101.802	Assignment of frequencies to mobile stations.
101.803	Transmitter power.
101.804	Bandwidth and emission limitations.
101.805	Modulation requirements.
101.806	Remote control operation of mobile television pickup stations.
101.807	Stations at temporary fixed locations.
101.808	Notification of station operation at temporary locations.
101.809	Stations affected by coordination contour procedures.

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PART 101

Subpart A – General

§ 101.1 Scope and authority.

(a) The purpose of the rules in this part is to prescribe the manner in which portions of the radio spectrum may be made available for private operational and common carrier fixed microwave operations that require transmitting facilities on land or in specified offshore coastal areas within the continental shelf.

(b) The rules in this part are issued pursuant to the authority contained in Titles I through III of the Communications Act of 1934, as amended, which vest authority in the Federal Communications Commission to regulate common carriers of interstate and foreign communications, to regulate radio transmissions and issue licenses for radio stations, and to regulate all interstate and foreign communications by wire and radio necessary to the accomplishment of the purposes of the Act.

§ 101.3 Definitions

Antenna power gain. The square of the ratio of the root-mean-square free space field intensity produced at one mile in the horizontal plane, in millivolts per meter for one kilowatt antenna input power to 137.6 mV/m. This ratio should be expressed in decibels (dB). (If specified for a particular direction, antenna power gain is based on the field strength in that direction only.)

Antenna power input. The radio frequency peak or RMS power, as the case may be, supplied to the antenna from the antenna transmission line and its associated impedance matching network.

Antenna structure. The antenna, its supporting structure and anything attached to it.

Assigned frequency. The center of the frequency band assigned to a station.

Assigned frequency bandwidth. The frequency band within which the emission of a station is authorized; the width of the band equals the necessary bandwidth plus twice the absolute value of the frequency tolerance.

Authorized bandwidth. The maximum bandwidth authorized to be used by a station as specified in the station license. (See § 2.202)

Authorized frequency. The frequency, or frequency range, assigned to a station by the Commission and specified in the instrument of authorization.

Authorized power. The maximum power a station is permitted to use. This power is specified by the Commission in the station's authorization.

Bandwidth occupied by an emission. The band of frequencies comprising 99 percent of the total radiated power extended to include any discrete frequency on which the power is at least 0.25 percent of the total radiated power.

Bit rate. The rate of transmission of information in binary (two state) form in bits per unit time.

Carrier. In a frequency stabilized system, the sinusoidal component of a modulated wave whose frequency is independent of the modulating wave; or the output of a transmitter when the modulating wave is made zero; or a wave generated at a point in the transmitting system and subsequently modulated by the signal; or a wave generated locally at the receiving terminal which when combined with the side bands in a suitable detector, produces the modulating wave.

Carrier frequency. The output of a transmitter when the modulating wave is made zero.

Central office. A landline termination center used for switching and interconnection of public message communication circuits.

Communication common carrier. Any person engaged in rendering communication service for hire to the public.

Control point. An operating position at which an operator responsible for the operation of the transmitter is stationed and which is under the control and supervision of the licensee.

Control station. A fixed station, the transmissions of which are used to control automatically the emissions or operations of a radio station, or a remote base station transmitter.

Coordination area. The area associated with a station outside of which another station sharing the same or adjacent frequency band neither causes nor is subject to interfering emissions greater than a permissible level.

Coordination contour. The line enclosing the coordination area.

Coordination distance. The distance on a given azimuth from a station beyond which another station neither causes nor is subject to interfering emissions greater than a permissible level.

Digital Electronic Message Service. A two-way end-to-end fixed radio service utilizing digital termination systems for the exchange of digital information. This service may also make use of point-to-point microwave facilities, satellite facilities or other communications media to interconnect digital termination systems to comprise a network.

Digital modulation. The process by which some characteristic (frequency, phase, amplitude or combinations thereof) of a carrier frequency is varied in accordance with a digital signal, e.g. one consisting of coded pulses or states.

Digital Electronic Message Nodal Station. A fixed point-to-multipoint radio station in a Digital Electronic Message Service providing two-way communication with Digital Electronic Message User Stations.

Digital Electronic Message User Station. Any one of the fixed microwave radio stations located at users' premises, lying within the coverage area of a Digital Electronic Message Nodal Station, and providing two-way digital communications with the Digital Electronic Message Nodal Station.

Drop point. A term used in the point-to-point microwave radio service to designate a terminal point where service is rendered to a subscriber.

Earth station. A station located either on the Earth's surface or within the major portion of Earth's atmosphere and intended for communication with one or more space stations or with one or more stations of the same kind by means of one or more reflecting satellites or other objects in space.

Effective radiated power (ERP). The product of the power supplied to the antennas and its gain relative to a half-wave dipole in a given direction.

Equivalent Isotropically Radiated Power (EIRP). The product of the power supplied to the antenna and the antenna gain in a given direction relative to an isotropic antenna.

Exchange. A unit of a communication company or companies for the administration of communication service in a specified area, which usually embraces a city, town, or village and its environs, and consisting of one or more central offices, together with the associated plant, used in furnishing communication service in that area.

Exchange area. The geographic area included within the boundaries of an exchange.

Fixed satellite earth station. An earth station intended to be used at a specified fixed point.

Fixed relay station. A fixed station associated with one or more stations, established to receive radio signals directed to it and to retransmit them automatically on a fixed service frequency.

Fixed Service. A radiocommunications service between specified fixed points.

Fixed station. A station in the fixed service.

Frequency tolerance. The maximum permissible departure by the center frequency of the frequency band occupied by an emission from the assigned frequency or, by the characteristic frequency of an emission from the reference frequency.

NOTE: The frequency tolerance is expressed in parts in 10^6 or in hertz.

General communication. Two-way voice communication, through a base station, between (1) a common carrier land mobile or airborne station and a landline telephone station connected to a public message landline telephone system, or (2) two common carrier land mobile stations, or (3) two common carrier airborne stations, or (4) a common carrier land mobile station and a common carrier airborne station.

Harmful interference. Interference that endangers the functioning of a radionavigation service or of other safety services or seriously degrades, obstructs or repeatedly interrupts a radiocommunication service operating in accordance with these Regulations.

Intermodal link. A point-to-point communications link used to provide communications between Nodal Stations or to interconnect Nodal Stations to other communications media.

Landing area. A landing area means any locality, either of land or water, including airports and intermediate landing fields, which is used, or approved for use for the landing and take-off of aircraft, whether or not facilities are provided for the shelter, servicing, or repair of aircraft, or for receiving or discharging passengers or cargo.

Local television transmission service. A public radio communication service for the transmission of television material and related communications.

Long haul system. A microwave system licensed under this Part in which the longest radio circuit of tandem radio paths exceeds 402 kilometers (250 miles).

Master station. A station in a multiple address radio system that controls, activates or interrogates four or more remote stations. Master stations performing such functions may also receive transmissions from remote stations.

Message center. The point at which messages from members of the public are accepted by the carrier for transmission to the addressee.

Microwave frequencies. As used in this part, this term refers to frequencies of 890 MHz and above.

Microwave link. A link is defined as a simplex communications circuit between two points utilizing a single frequency/polarization assignment. A duplex communications circuit would require two links, one link in each direction.

Miscellaneous common carriers. Communications common carriers that are not engaged in the business of providing either a public landline message telephone service or public message telegraph service.

Mobile earth station. An earth station intended to be used while in motion or during halts at unspecified points.

Mobile Service. A radiocommunication service between mobile and land stations or between mobile stations.

Mobile station. A station in the mobile service intended to be used while in motion or during halts at unspecified points.

Multiple address system (MAS). A point-to-multipoint radio communications system, either one-way or two-way, utilizing frequencies listed in Section 101.605 and serving a minimum of four unique remote stations. Each master station must serve at least its own four remotes operating on its assigned frequency. The remote stations must be scattered over the service area in such a way that two or more point-to-point systems would be needed to serve those remotes.

Necessary bandwidth. For a given class of emission, the width of the frequency band that is just sufficient to ensure the transmission of information at the rate and with the quality required under specified conditions. The necessary bandwidth may be calculated using the formulas in § 2.202 of this Chapter.

Nodal station. The central or controlling station in a radio system operating on point-to-multipoint frequencies in the 2.5, 10.6, or 18 GHz bands.

Occupied bandwidth. The width of a frequency bandwidth such that, below the lower and above the upper frequency limits, the mean powers emitted are each equal to a specified percentage, B/2 of the total mean power of a given emission. Unless otherwise specified by the CCIR for the appropriate class of emission, the value of B/2 should be taken as 0.5%.

Note: The percentage of the total power outside the occupied bandwidth is represented by B.

Operational fixed station. A private fixed station not open to public correspondence.

Passive repeater. A re-radiation device located in the far field of a transmitting/receiving antenna that re-directs intercepted radio frequency energy. For example, it may consist of a reflector(s) or back-to-back parabolic or horn antennas.

Periscope antenna system. An antenna system that re-directs intercepted radio frequency energy consisting of an active portion and a reflector which is located in the near field or transition field (i.e., within several hundred meters) of the active portion.

Point-to-point microwave radio service. A common carrier public radio service rendered on microwave frequencies by fixed and temporary fixed stations between points that lie within the United States or between points to its possessions or to points in Canada or Mexico.

Private carrier. An entity licensed in the private service and authorized to provide communications service to other private service eligibles on a commercial basis.

Private line service. A service whereby facilities for communication between two or more designated points are set aside for the exclusive use or availability for use of a particular customer and authorized users during stated periods of time.

Public correspondence. Any telecommunication which the offices and stations must, by reason of their being at the disposal of the public, accept for transmission.

Public message service. A service whereby facilities are offered to the public for communication between all points served by a carrier or by interconnected carriers on a non-exclusive message by message basis, contemplating a separate connection for each occasion of use.

Radio station. A separate transmitter or a group of transmitters under simultaneous common control, including the accessory equipment required for carrying on a radiocommunication service.

Radiocommunication. Telecommunication by means of radio waves.

Rated power output. The maximum radio frequency power output capability (peak or average power) of a transmitter, under optimum conditions of adjustment and operation, specified by its manufacturer.

Record communication. Any transmission of intelligence which is reduced to visual record form at the point of reception.

Reference frequency. A frequency coinciding with or having a fixed and specified relation to the assigned frequency. This frequency does not necessarily correspond to any frequency in an emission.

Relay station. A fixed station used for the reception and retransmission of the signals of another station or stations.

Remote station. A fixed station in a multiple address radio system that transmits one-way to

one or more central receive sites, controls a master station, or is controlled, activated or interrogated by, and may respond to, a master station.

Repeater station. A fixed station established for the automatic retransmission of radiocommunications received from one or more mobile stations and directed to a specified location; for public mobile radio operations, a fixed station that automatically retransmits the mobile communications and/or transmitter information about the base station, along a fixed point-to-point link between the base station and the central station.

Short haul system. A microwave system licensed under this Part in which the longest radio circuit of tandem radio paths does not exceed 402 kilometers (250 miles).

Signaling communication. One-way communications from a base station to a mobile or fixed receiver, or to multi-point mobile or fixed receivers by audible or subaudible means, for the purpose of actuating a signaling device in the receiver(s) or communicating information to the receiver(s), whether or not the information is to be retained in record form.

Standby transmitter. A transmitter installed and maintained for use in lieu of the main transmitter only during periods when the main transmitter is out of service for maintenance or repair.

Symbol rate. Modulation rate in bauds. This rate may be higher than the transmitted bit rate as in the case of coded pulses or lower as in the case of multilevel transmission.

Telegraphy. A form of telecommunication which is concerned in any process providing transmission and reproduction at a distance of documentary matter, such as written or printed matter or fixed images, or the reproduction at a distance of any kind of information in such a form. Unless otherwise specified, telegraphy means a form of telecommunication for the transmission of written matter by the use of signal code.

Telemetering. The use of telecommunication for automatic indicating or recording measurements at a distance from the measuring instrument.

Telephony. A form of telecommunication set up for the transmission of speech, or in some cases, other sounds.

Television. A form of telecommunication for transmission of transient images of fixed or moving objects.

Temporary fixed station. A station established in a non-permanent mode (temporary) at a specified location for a short period of time, ranging up to one year. Temporary-fixed operations are itinerant in nature, and are not to be confused with mobile-type operations.

Video entertainment material. The transmission of a video signal (e.g. United States Standard Monochrome or National Television Systems Committee 525-line television) and an associated audio signal which is designed primarily to amuse or entertain, such as movies and games.

Subpart B: Applications and Licenses

GENERAL FILING REQUIREMENTS

§ 101.5 Station authorization required.

(a) No radio transmitter shall be operated in this service except under and in accordance with a proper station authorization granted by the Federal Communications Commission. Except as provided in paragraph (d) of this section, no construction or modification of a station may be commenced without an authorization from the Commission.

(b) A separate application form must be filed for each Digital Electronic Message Service Nodal Station. No license is required for a Digital Electronic Message User Station. Authority for a Digital Electronic Message Nodal Station licensee to serve a specific number of user stations to be licensed in the name of the carrier must be requested on FCC Form 494 filed for the Digital Electronic Message Nodal Station.

(c) If construction and or operation may have a significant environmental impact as defined by Sec. 1.1307 of the Commission's rules, the requisite environmental assessment as prescribed in Sec. 1.1311 of this chapter must be filed with the application and Commission environmental review must be completed before construction of the station is initiated. See § 1.1312 of this chapter.

(d) For stations authorized under Subpart H (Private Operational Fixed Radio Service), construction, but not operation, of new or modified stations may be initiated prior to grant of an authorization.

§ 101.7 Eligibility for station license.

(a) A station license may not be granted to or held by a foreign government or by a representative of a foreign government.

(b) In the Common Carrier service, a station license may not be granted or held by:

(1) Any alien or the representative of any alien.

(2) Any corporation organized under the laws of any foreign government.

(3) Any corporation of which any officer or director is an alien.

(4) Any corporation of which more than one-fifth of the capital stock is owned of record or voted by: aliens or their representatives; a foreign government or representatives thereof; or any corporation organized under the laws of a foreign country.

(5) Any corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens, if the Commission finds that the public interest will be served by the refusal or revocation of such license.

(6) Any corporation directly or indirectly controlled by any other corporation of which

more than one-fourth of the capital stock is owned of record or voted by aliens or their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign government, if the Commission finds that the public interest will be served by the refusal or revocation of such license.

§ 101.9 Formal and informal applications.

(a) Except for an authorization under any of the proviso clauses of section 308(a) of the Communications Act of 1934 (47 U.S.C. 308(a)), the Commission will grant the following authorizations only upon written application: Station licenses; modifications of station licenses; renewals of station licenses; extensions of time to construct; transfers and assignments of station licenses or of any rights thereunder.

(b) Except as may be otherwise permitted by this Part, a separate written application must be filed for each instrument of authorization requested. Applications may be:

(1) "Formal applications" where the Commission has prescribed in this part a standard form; or

(2) "Informal applications" (normally in letter form) where the Commission has not prescribed a standard form.

(c) An informal application will be accepted for filing only if:

(1) A standard form is not prescribed or clearly applicable to the authorization requested;

(2) It is a document submitted, in duplicate, with a caption which indicates clearly the nature of the request, radio service involved, location of the station, and the application file number (if known); and

(3) It contains all the technical details and informational showings required by the rules and states clearly and completely the facts involved and authorization desired.

§ 101.11 Filing of applications, fees, and number of copies.

(a) Part 1 of this chapter contains information on application filing procedures and requirements for all services authorized under this Part. All filings must include the original application plus one copy.

(b) Applications or filings requiring fees as set forth at Part 1, Subpart G of this chapter must be filed in accordance with Sec. 0.401(b) of this chapter. Applications or filings not requiring fees must be submitted to: Federal Communications Commission, Common Carrier Radio Services, 1270 Fairfield Road, Gettysburg, PA 17325.

(c) All correspondence or amendments concerning a submitted application must clearly identify the radio service, the name of the applicant, station location, and the Commission file number (if known) or station call sign of the application involved.

(d) Except as otherwise specified, all applications, amendments, and correspondence must be signed as prescribed by Part 1 of this Chapter.

§ 101.13 Application forms and requirements for private operational fixed stations.

(a) A separate application must be submitted on FCC Form 402 for the following:

(1) New station authorization for private operational fixed microwave station.

(2) New authorization to operate one or more fixed stations at temporary locations in this service.

(3) Modification of station license.

(4) New station authorization or modification of license for each master station of a system consisting of a master station and its associated remote stations.

(5) The Commission's consent to the assignment of an authorization to another person or entity. In addition, the application must be accompanied by a signed letter from proposed assignor stating the desire to assign all right, title, and interest in and to such authorization, stating the call sign and location of the station, and that the assignor will submit its current station authorization for cancellation upon completion of the assignment. Form 1046 may be used in lieu of this letter.

(b) An application for authority to operate a fixed station at temporary locations must specify the precise geographic area within which the operation will be confined. The area specified must be defined as a radius of operation about a given latitude/longitude or as a rectangular area bounded by upper and lower lines of latitude and longitude. Exception to this specific requirement may be made for exceptionally large areas, such as the continental United States. Sufficient data must be submitted to show the need for the proposed area of operation.

(1) If an operational-fixed station is authorized to be operated at temporary locations and actually remains, or is to remain, at the same location for a period of over a year, application for a permanent authorization specifying the fixed location must be made as soon as possible but not later than 30 days after the expiration of the one-year period.

(2) Operation of a fixed station at temporary locations will be authorized only on the frequency pair 6535/6575 MHz, and in frequency bands shared for operational fixed and mobile operations.

(c) A separate application form for point-to-multipoint frequencies in the 10.6 GHz and 18 GHz bands must be filed for each Nodal Station except for operations consistent with § 101.605(l)(3). Each Nodal Station application must specify the service area that will be served by the station in terms of a distance radius or other geographical specification, and, if applicable, the Standard Metropolitan Statistical Area (SMSA) being served.

(d) Application for renewal of station licenses must be submitted on such form as the Commission may designate by public notice. Applications for renewal must be made during the license term and should be filed within 90 days, but not later than 30 days, prior to the end of the license term. When a licensee submits a timely application for renewal of a station license, the existing license for that station will continue as a valid authorization until the Commission has made a final decision on the application.

(e) A separate application must be filed for each fixed master station in a Multiple Address System (MAS). Applications may include any number of remote stations in a single application, but must specify the geographic service area in which these remote stations will

be located. Applications for mobile operations or for systems employing only remote stations must designate a reference point (set of coordinates) at or near the center of the area being served.

§ 101.15 Application forms for common carrier fixed stations.

(a) New or modified facilities. FCC Form 494 must be submitted and a license granted for each station prior to commencement of any proposed station construction. FCC Form 494 also must be submitted to amend any license application, to modify any license pursuant to §§ 101.57(a) and 101.59, and to notify the Commission of modifications made pursuant to § 101.61. Cancellation of a license can be made by letter.

(b) Certification of completion of construction. FCC Form 494A must be submitted to certify completion of construction.

(c) Additional time to construct. FCC Form 701 ("Application for Additional Time to Construct Radio Station") must be filed prior to the expiration of the time for construction noted in a license to modify the license by extending the period of construction.

(d) Renewal of station license. Except for renewal of special temporary authorizations, FCC Form 405 ("Application for Renewal of Station License") must be filed by the licensee between thirty (30) and sixty (60) days prior to the expiration date of the license sought to be renewed. Whenever a group of station licenses in the same radio service are to be renewed simultaneously, a single "blanket" application may be filed to cover the entire group if the application identifies each station by call sign and station location. Applicants should note also any special renewal requirements under the rules for each radio service.

(e) Assignment of license. FCC Form 702 ("Application for Consent to Assignment of Radio Station Construction Authorization or License for Stations in Services Other than Broadcast") must be submitted to assign voluntarily (as by, for example, contract or other agreement) or involuntarily (as by, for example, death, bankruptcy, or legal disability) the station authorization. In the case of involuntary assignment (or transfer of control) the application must be filed within 10 days of the event causing the assignment (or transfer of control). FCC Form 702 must also be used for non-substantial (pro forma) assignments. In addition, FCC Form 430 ("Licensee Qualification Report") must be submitted by the proposed assignee unless such assignee has a current and substantially accurate report on file with the Commission. Whenever a group of station licenses in the same radio services are to be assigned to a single assignee, a single "blanket" application may be filed to cover the entire group, if the application identifies each station by call sign and station location. The assignment must be completed within 45 days from the date of authorization. Upon consummation of an approved assignment, the Commission must be notified by letter of the date at consummation within 10 days of its occurrence.

(f) Partial assignment of license. Authorization for assignment from one company to another of only a part or portions of the facilities (transmitters) authorized under an existing license (as distinguished from an assignment of the facilities in their entirety) may be granted upon application:

(1) By the assignor on FCC Form 494 for deletion of the assigned facilities (no fee required).

(2) By the assignee on FCC Form 494 with a request for recertification in the name of the assignee for frequencies eliminated from assignor's license (fee required).

The assignment must be consummated within 45 days from the date of authorization. In the event that consummation does not occur, FCC Form 494 must be submitted to return the assignor's license to its original condition.

(g) Transfer of control of corporation holding a conditional license or license. FCC Form 704 ("Application for Consent to Transfer of Control") must be submitted in order to voluntarily or involuntarily transfer control (de jure or de facto) of a corporation holding any conditional licenses or licenses. FCC Form 704 must also be used for non-substantial (pro forma) transfers of control. The transfer must be completed within 45 days from the date of authorization. Upon consummation of an approved transfer, the Commission must be notified by letter of the date of consummation within 10 days of its occurrence. Applicant may request extension of time to consummate by submitting an informal request within 10 days of date expiration of authorization.

(h) Licensee qualifications. FCC Form 430 ("Licensee Qualification Report") must be filed annually, no later than March 31 for the end of the preceding calendar year, by licensees for each common carrier radio service authorized under this part, if service was offered at any time during the preceding year. Each annual filing must include all changes of information required by FCC Form 430 that occurred during the preceding year. In those cases in which there has been no change in any of the required information, the applicant or licensee, in lieu of submitting a new form, may so notify the Commission by letter.

§ 101.17 [Reserved]

§ 101.19 General application requirements.

(a) Each application for a license or for consent to assignment or transfer of control must:

(1) Disclose fully the real party (or parties) in interest, including (as required) a complete disclosure of the identify and relationship of those persons or entities directly or indirectly owning or controlling (or both) the applicant;

(2) Demonstrate the applicant's legal, technical, and other qualifications to be a licensee;

(3) Submit the information required by the Commission's Rules, requests, and application forms;

(4) Be maintained by the applicant substantially accurate and complete in all significant respects in accordance with the provisions of Sec. 1.65 of this chapter; and

(5) Show compliance with the special requirements applicable to each radio service and make all special showings that may be applicable (e.g., those required by §§ 101.103(d), 101.701, 101.713 and of this part, etc.).

(b) In addition to the general application requirements of §§ 101.19 and 101.21 of this part, applicants must submit any additional documents, exhibits, or signed written statements of fact:

(1) As may be required by the other parts of the Commission's Rules, and the other subparts of this part (particularly Subpart C and those subparts applicable to the specific radio

service involved); and

(2) As the Commission, at any time after the filing of an application and during the term of any authorization, may require from any applicant, permittee, or licensee to enable it to determine whether a radio authorization should be granted, denied, or revoked.

(c) All applicants are required to indicate at the time their application is filed whether an authorization of the facilities is categorically excluded as defined by § 1.1306 of the Commission's rules. If answered affirmatively, an Environmental Assessment as described by § 1.1311, need not be filed with the application.

§ 101.21 Technical content of common carrier applications.

Applications must contain all technical information required by the application form and any additional information necessary to fully describe the proposed facilities and to demonstrate compliance with all technical requirements of the rules governing the radio service involved (see Subparts C, F, G, I, and J, as appropriate). The following paragraphs describe a number of technical requirements.

(a) Each application proposing a new or modified antenna structure for a station (including a receive-only or passive repeater) must include a copy of the FAA "no hazard determination" if FAA notification is required by Part 17 of this chapter. Complete information as to rules concerning the construction, marking and lighting of antenna structures is contained in Part 17 of this chapter. See also Sec. 101.121 if the structure is used by more than one station.

(b) Each application for construction permit for a developmental authorization must be accompanied by pertinent supplemental information as required by Sec. 101.411 in addition to such information as may be specifically required by this section.

(c) Each application in the Point-to-Point Radio, Local Television Transmission, and Digital Electronic Message Service (excluding user stations) proposing a new or replacement antenna (excluding omnidirectional antennas) must include an antenna radiation pattern showing the antenna power gain distribution in the horizontal plane expressed in decibels, unless such pattern is known to be on file with the Commission in which case the applicant may reference in its application the FCC-ID number that indicates that the pattern is on file with the Commission.

§ 101.23 Waiver of rules.

Waivers of these rules may be granted upon application or on the Commission's own motion. A request for waiver shall contain a statement of reasons sufficient to justify a waiver. A waiver will not be granted except upon an affirmative showing that:

(a) The underlying purpose of the rule will not be served, or would be frustrated, by its application in the particular case, and that grant of the waiver is otherwise in the public interest; or

(b) The unique facts and circumstances of a particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest. Applicants must also show the lack of a reasonable alternative.

§ 101.25 Inconsistent or conflicting applications.

While an application is pending and undecided, no subsequent inconsistent or conflicting

application may be filed by the same applicant, the applicant's successor or assignee, or on behalf or for the benefit of the same applicant, the applicant's successor or assignee.

§ 101.27 Repetitious applications.

(a) Where an applicant has been afforded an opportunity for a hearing with respect to a particular application for a new station, or for an extension or enlargement of a service or facilities, and the Commission has, after hearing or default, denied the application or dismissed it with prejudice, the Commission will not consider a like application involving service of the same kind to the same area by the same applicant, or by the applicant's successor or assignee, or on behalf of or for the benefit of the original parties in interest, until after the lapse of 12 months from the effective date of the Commission's order. The Commission may, for good cause shown, waive the requirements of this section.

(b) Where an appeal has been taken from the action of the Commission denying a particular application, another application for the same class of station and for the same area, in whole or in part, filed by the same applicant or by the applicant's successor or assignee, or on behalf or for the benefit of the original parties in interest, will not be considered until the final disposition of such appeal.

§ 101.29 Amendment of pending applications.

(a) Any pending application may be amended as a matter of right if the application has not been designated for hearing, or for comparative evaluation pursuant to § 101.51, or for the random selection process, provided, however, that the amendments must comply with the provisions of § 101.41 as appropriate.

(b) Requests to amend an application designated for hearing or for comparative evaluation, or tentatively selected by the random selection process may be granted only if a written petition demonstrating good cause is submitted and properly served upon the parties of record.

(c) The Commission will classify amendments on a case-by-case basis. Whenever previous amendments have been filed, the most recent amendment will be classified by reference to how the information in question stood as of the latest Public Notice issued which concerned the application. An amendment will be deemed to be a major amendment subject to Sec. 101.37 and Sec. 101.45 under any of the following circumstances:

(1) if the amendment results in a substantial modification of the engineering proposal such as (but not necessarily limited to):

(i) A change in, or an addition of a radio frequency channel;

(ii) A change in polarization of the transmitted signal;

(iii) An increase in the transmitter output power of three (3) dB or more in the Private Fixed, Point-to-Point, and Local Television Transmission Services;

(iv) A change in type of transmitter emission or an increase in emission bandwidth requiring a larger authorized bandwidth;

(v) A change in the geographic coordinates of a station's transmitting antenna of more than ten (10) seconds of latitude or longitude, or both;

(vi) A change of more than one (1) degree in the azimuth of the center of the main lobe of radiation of a point-to-point station's transmitting antenna (including any deflections by repeating devices);

(vii) Any change which increases the antenna center line height to a new height that would trigger a requirement for a new aeronautical study; or

(viii) Any changes or combination of changes which would cause harmful electrical interference to an authorized facility or result in a mutually exclusive conflict with another pending application; or

(ix) Any technical change that would increase the effective radiated power in any direction by more than one and one-half (1.5) dB in the Digital Electronic Message Service.

(2) If the amendment would convert a proposal, such that it may have a significant impact upon the environment under Sec. 1.1307 of the Commission's rules, which would require the submission of an environmental assessment, see Sec. 1.1311 of this chapter, and Commission environmental review, see Secs. 1.1308 and 1.1312 of this chapter.

(3) If the amendment results in a substantial and material alteration of the proposed service.

(4) If the amendment specifies a substantial change in beneficial ownership or control (*de jure* or *de facto*) of an applicant such that the change would require, in the case of an authorized station, the filing of a prior assignment or transfer of control application under section 310(d) of the Communications Act of 1934 [47 U.S.C. 310(d)]. Such a change would not be considered major where the assignment or transfer of control is for legitimate business purposes other than the acquisition of applications.

(5) If the amendment, or the cumulative effect of the amendment, is determined by the Commission otherwise to be substantial pursuant to section 309 of the Communications Act of 1934.

(d) The applicant must serve copies of any amendments or other written communications upon the following parties:

(1) Any applicant whose application appears on its face to be mutually exclusive with the application being amended, including those applicants originally served under § 101.509;

(2) Any applicant whose application has been found by the Commission, as published in a public notice, to be mutually exclusive with the application being amended; and

(3) Any party who has filed a petition to deny the application or other formal objection, when that petition or formal objection has not been resolved by the Commission.

(e) The Commission may waive the service requirements of paragraph (d) of this section and prescribe such alternative procedures as may be appropriate under the circumstances to protect petitioners' interests and to avoid undue delay in a proceeding, if an applicant submits a request for waiver which demonstrates that the service requirement is unreasonably burdensome. Requests for waiver must be served on petitioners. Oppositions to the petition may be filed within five (5) days after the petition is filed and must be served on the applicant.

Replies to oppositions will not be entertained.

(f) Any amendment to an application must be signed and must be submitted in the same manner, and with the same number of copies, as was the original application. Amendments may be made in letter form if they comply in all other respects with the requirements of this chapter.

§ 101.31 Special temporary authority.

(a) In circumstances requiring immediate or temporary use of facilities, request may be made for special temporary authority to install and/or operate new or modified equipment. Any such request may be submitted as an informal application in the manner set forth in Section 101.9 and must contain full particulars as to the proposed operation including all facts sufficient to justify the temporary authority sought and the public interest therein. No such request will be considered unless the request is received by the Commission at least 10 days prior to the date of proposed construction or operation or, where an extension is sought, expiration date of the existing temporary authorization.

(b) Special temporary authorization may be granted upon written request in the following circumstances:

(1) In emergency situations;

(2) to permit restoration or relocation of existing facilities to continue communication service;

(3) to conduct tests to determine necessary data for the preparation of an application for regular authorization;

(4) for a temporary, non-recurring service where a regular authorization is not appropriate;

(5) in other situations involving circumstances which are of such extraordinary nature that delay in the institution of temporary operation would seriously prejudice the public interest.

(c) The Commission may grant requests for special temporary authority without issuing the public notice provided for in §1.962 of this chapter for periods not exceeding 180 days, if there are extraordinary circumstances supporting the request and where delay in commencing temporary operation would seriously prejudice the public interest. Requests for special temporary authorization not involving extraordinary circumstances may be granted without public notice for a period of 30 days where an application for regular operation is not contemplated or for 60 days pending or after the filing of an application for regular operation.

(d) Request for special temporary authority must contain the following information:

(1) Name, address, and citizenship status of applicant;

(2) Need for special action, including a description of any emergency or damage to equipment;

(3) Type of operation to be conducted;

(4) Purpose of operation;

(5) Time and date of operation desired;

(6) Class of station and nature of service;

(7) Location of station and points with which station will communicate;

(8) Equipment to be used, specifying manufacturer, model number, and number of units;

(9) Frequency(s) desired.

(10) Azimuth and beamwidth of major lobe of transmitting antenna and ERP;

(11) Type of emission;

(12) Description of antenna to be used, including height.

(13) Certification that neither the applicant nor any party to the applicant is subject to a denial of Federal benefits that includes FCC benefits pursuant to section 5301 of the Anti-Drug Abuse Act of 1988, as required by §1.2002 of this Chapter.

§ 101.33 Who may sign applications.

See Part 1 of this chapter Sections 1.743 and 1.913, for practices and procedures governing signatures on applications, amendments and related statements of fact..

Processing of Applications

§ 101.35 Preliminary processing of applications.

(a) Applications received for filing are given a file number. The assignment of a file number to an application is for administrative convenience and does not indicate the acceptance of the application for filing and processing and does not preclude the subsequent return of the application.
(b) Applications that are incomplete with respect to answers, supplementary statements, execution, or other matters of a formal character will be considered defective and may be returned to the applicant with a brief statement as to such defects. If an applicant is requested by the Commission to file any additional documents or information not included in the prescribed application form, failure to comply with such request will be deemed to render the application defective, and such application may be dismissed. Applications will also be deemed to be defective and may be returned to the applicant in the following cases:

(1) Statutory disqualification of applicant;

(2) Proposed use or purpose of station would be unlawful;

(3) Requested frequency is not allocated for assignment for the service proposed;

(4) The submitted filing fee (if required) is insufficient;

(5) The application does not demonstrate compliance with the special requirements applicable to the radio service involved;

(6) The applications does not include all necessary exhibits;

(7) The application fails to meet any other Commission requirements.

(c) Any application that has been returned to the applicant for correction will be processed in original order of receipt when resubmitted if it is received within 60 days from the date on which it was returned to the applicant and the change does not involve a major amendment. If the application is not resubmitted within the prescribed time, it will be treated as a new application and considered at the time other applications received on the same date are considered.

(d) Applications considered defective under paragraph (b) of this section may be accepted for filing if:

(1) The application is accompanied by a request which sets forth the reasons in support of a waiver of (or an exception to), in whole or in part, any specific rule, regulation, or requirement with which the application is in conflict; or

(2) The Commission, upon its own motion, waives (or allows an exception to), in whole or in part, any rule, regulation or requirement.

§ 101.37 Public notice period.

(a) At regular intervals, the Commission will issue a public notice listing:

(1) The acceptance for filing of applications and major amendments thereto;

(2) Significant Commission actions concerning applications;

(3) The receipt of applications for minor modifications made pursuant to Sec. 101.59;

(4) Information which the Commission in its discretion believes of public significance; and

(5) Special environmental considerations as required by Part 1 of this chapter.

(b) A public notice will not normally be issued for any of the following applications:

(1) For authorization of a minor technical change in the facilities of a proposed or authorized station where such a change would not be classified as a major amendment to a pending application, as defined by § 101.29, or as a minor modification to a license pursuant to § 101.59;

(2) For temporary authorization pursuant to § 101.31;

(3) For an authorization under any of the proviso clauses of section 308(a) of the Communications Act of 1934 (47 U.S.C. 308(a));

(4) For consent to an involuntary assignment or transfer of control of a radio authorization; or

(5) For consent to a voluntary assignment or transfer of control of a radio authorization, where the assignment or transfer does not involve a substantial change in ownership or control.

(c) Except as otherwise provided in this Part (e.g., Sec. 101.59), no application that has appeared on public notice will be granted until the expiration of a period of thirty days following the issuance of the public notice listing the application, or any major amendment thereto, or until the expiration of a period of thirty days following the issuance of a public notice identifying the tentative selectee of a random selection process, whichever is later.

(d) The listing of an application on public notice as accepted for filing does not indicate that the application has been found by the Commission to be acceptable for filing and does not preclude the subsequent return of the application.

§ 101.39 Dismissal and return of applications.

(a) Except as provided under paragraph (d) of this Section and under § 101.41, any application may, upon written request, be dismissed without prejudice as a matter of right prior to the adoption date of any final Commission action or the application's designation for hearing or comparative evaluation.

(b) Applicants for stations licensed under Subpart H (Private Operational Fixed Microwave Service) may request the return of an application for correction without dismissal.

(c) A request to dismiss an application without prejudice will be considered after designation for hearing, after selection through the comparative evaluation procedure of § 101.51, or after selection as a tentative selectee in a random selection proceeding, only if:

(1) A written petition is submitted to the Commission and, in the case of applications designated for hearing or comparative evaluation, is properly served upon all parties of record;

(2) The petition is submitted before the issuance date of a public notice of Commission action denying the application; and

(3) The petition complies with the provision of § 101.41 (whenever applicable) and demonstrates good cause.

(d) Except as provided under § 101.41, an application designated for inclusion in the random selection process may be dismissed without prejudice as a matter of right if the applicant requests its dismissal at least 2 days prior to a random selection proceeding.

(e) Dismissal for failure to prosecute or for failure to respond to official correspondence or requests for additional information within a specified time period will be without prejudice prior to its designation for hearing, or tentative selection by the random selection process. Dismissal may be with prejudice after selection of the comparative evaluation process, or after selection as a tentative selectee in a random selection proceeding.

§ 101.41 Ownership changes and agreements to amend or dismiss applications or pleadings.

(a) Except as provided in paragraph (b) of this section, applicants or any other parties in interest to pending applications must comply with the provisions of this section whenever:

(1) They participate in any agreement (or understanding) which involves any consideration promised or received, directly or indirectly, including any agreement (or understanding) for merger of interests or the reciprocal withdrawal of applications; and

(2) The agreement (or understanding) may result in either:

(i) A proposed substantial change in beneficial ownership or control (dejure or de facto) of an applicant such that the change would require, in the case of an authorized station, the filing of a prior assignment or transfer of control application under § 310(d) of the Communications Act of 1934 [47 U.S.C. § 310(d)], or

(ii) Proposed withdrawal, amendment or dismissal of any application(s), amendment(s), petition(s), pleading(s), or any combination thereof, which would thereby permit the grant without hearing, comparative evaluation under of Sec. 101.51, or random selection of an application previously in contested status.

(b) The provisions of this section will not be applicable to any engineering agreement (or understanding) that:

(1) Resolves frequency conflicts with authorized stations or other pending applications without the creation of new or increased frequency conflicts; and

(2) Does not involve any consideration promised or received, directly or indirectly (including any merger of interests or reciprocal withdrawal of applications), other than the mutual benefit of resolving the engineering conflict.

(c) For any agreement subject to this section, the applicant of an application which would remain pending pursuant to such an agreement will be considered responsible for the compliance by all parties with the procedures of this section. Failure of the parties to comply with the procedures of this section will constitute a defect in those applications which are involved in the agreement and remain in a pending status.

(d) The principals to any agreement or understanding subject to this section must comply with the standards of paragraph (e) of this section in accordance with the following procedure:

(1) Within ten (10) days after entering into the agreement, the parties thereto must jointly notify the Commission in writing of the existence and general terms of such agreement, the identity of all of the participants and the applications involved;

(2) Within thirty (30) days after entering into the agreement, the parties thereto must file any proposed application amendments, motions, or requests together with a copy of the agreement which clearly sets forth all terms and provisions, and such other facts and information as necessary to satisfy the standards of paragraph (e) of this section. Such submission must be accompanied by the certification by affidavit of each principal to the agreement declaring that the statements made are true, complete, and correct to the best of their knowledge and belief, and are made in good faith.

(3) The Commission may request any further information which in its judgment it

believes is necessary for a determination under paragraph (e) of this section.

(e) The Commission will grant an application (or applications) involved in the agreement (or understanding) only if it finds upon examination of the information submitted, and upon consideration of such other matters as may be officially noticed, that the agreement is consistent with the public interest, and the amount of any monetary consideration and the cash value of any other consideration promised or received is not in excess of those legitimate and prudent costs directly assignable to the engineering, preparation, filing and advocacy of the withdrawn, dismissed, or amended application(s), amendment(s), petition(s), pleading(s), or any combination thereof. Where such costs represent the applicant's in-house efforts, these costs may include only directly assignable costs and must exclude general overhead expenses. [The treatment to be accorded such consideration for interstate rate making purposes will be determined at such time as the question may arise in an appropriate rate proceeding.] An itemized accounting must be submitted to support the amount of consideration involved except where such consideration (including the fair market value of any non-cash consideration) promised or received does not exceed one thousand dollars ($1,000.00). Where consideration involves a sale of facilities or merger of interests, the accounting must clearly identify that portion of the consideration allocated for such facilities or interests and a detailed description thereof, including estimated fair market value. The Commission will not presume an agreement (or understanding) to be prima facie contrary to the public interest solely because it incorporates a mutual agreement to withdraw pending application(s), amendment(s), petition(s), pleading(s), or any combination thereof.

§ 101.43 Opposition to applications.

(a) Any party in interest may file with the Commission a petition to deny any application for which public notice is required. All such petitions must:

(1) Identify the application or applications including applicant's name, station location, Commission file numbers and radio service involved with which it is concerned;

(2) Be filed in accordance with the pleading limitations, filing periods, and other applicable provisions of this Part and Part 1;

(3) Contain specific allegations of fact (except for those of which official notice may be taken), supported by affidavit of a person or persons with personal knowledge thereof and be sufficient to make a prima facie showing that the petitioner is a party in interest and that a grant of the application would be inconsistent with the public interest, convenience and necessity;

(4) Be filed within thirty (30) days after the date of public notice announcing the acceptance for filing of such applications or major amendments thereto, or, identifying the tentative selectee of a random selection proceeding (unless the Commission otherwise extends the deadline); and

(5) Contain a certificate of service showing that the applicant has been mailed a copy of the petition no later than the date on which the petition is filed with the Commission.

(b) The applicant may file an opposition to any petition to deny and the petitioner may file a reply thereto in which allegations of fact or denials thereof must be supported by an affidavit of a person or persons with personal knowledge thereof and be clearly identified. The applicant

must serve a copy of the opposition on the petitioner, and the petitioner must serve a copy of its reply on the applicant. The time for filing such oppositions and replies are provided in § 1.45.

(c) Notwithstanding the provisions of paragraph (a) of this section, before Commission action on any application for an instrument of authorization, any person may file informal objections to the grant. The Commission will consider informal objections, but not necessarily discuss them in a written opinion, if the objection is filed at least one day prior to action on the application and the objection is signed by the submitting person with a disclosure of that person's interest. Such objections may be submitted in letter form. The limitation on pleadings and time for filing pleadings provided for in § 1.45 will not be applicable to any objections duly filed pursuant to this paragraph.

(d) Petitions to deny not filed in accordance with paragraph (a) of this section will be treated as informal objections.

§ 101.45 Mutually exclusive applications.

(a) The Commission will consider applications to be mutually exclusive if their conflicts are such that the grant of one application would effectively preclude by reason of harmful electrical interference, or other practical reason, the grant of one or more of the other applications. The Commission will presume "harmful electrical interference" to mean interference which would result in a material impairment to service rendered to the public despite full cooperation in good faith by all applicants or parties to achieve reasonable technical adjustments which would avoid electrical conflict.

(b) A common carrier application will be entitled to be included in a random selection process or to comparative consideration with one or more conflicting applications only if:

(1) The application is mutually exclusive with the other application; and

(2) The application is received by the Commission in a condition acceptable for filing by whichever "cut-off" date is earlier:

(i) Sixty (60) days after the date of the public notice listing the first of the conflicting applications as accepted for filing; or

(ii) One (1) business day preceding the day on which the Commission takes final action on the previously filed application (should the Commission act upon such application in the interval between thirty (30) and sixty (60) days after the date of its public notice).

(c) Whenever three or more applications are mutually exclusive, but not uniformly so, the earliest filed application established the date prescribed in paragraph (b)(2) of this section, regardless of whether or not subsequently filed applications are directly mutually exclusive with the first filed application. [For example, applications A, B, and C are filed in that order. A and B are directly mutually exclusive, B and C are directly mutually exclusive. In order to be considered comparatively with B, C must be filed within the "cut-off" period established by A even though C is not directly mutually exclusive with A.]

(d) Private fixed microwave applications for authorization under this Part will be entitled to be included in a random selection process or to comparative consideration with one or more conflicting applications in accordance with the provisions of §1.227(b)(4).

(e) An application otherwise mutually exclusive with one of more previously filed applications, but filed after the appropriate date prescribed in paragraphs (b) or (d) of this section, will be returned without prejudice and will be eligible for refiling only after final action is taken by the

Commission with respect to the previously filed application (or applications).

(f) For the purposes of this section, any application (whether mutually exclusive or not) will be considered to be a newly filed application if it is amended by a major amendment (as defined by § 101.29), except under any of the following circumstances:

(1) The application has been designated for comparative hearing, or for comparative evaluation (pursuant to Sec. 101.51), and the Commission or the presiding officer accepts the amendment pursuant to Sec. 101.29(b);

(2) The amendment resolves frequency conflicts with authorized stations or other pending applications which would otherwise require resolution by hearing, by comparative evaluation pursuant to Sec. 101.51, or by random selection pursuant to Sec. 101.49 provided that the amendment does not create new or additional frequency conflicts;

(3) The amendment reflects only a change in ownership or control found by the Commission to be in the public interest, and for which a requested exemption from the "cut-off" requirements of this section is granted;

(4) The amendment reflects only a change in ownership or control which results from an agreement under Sec. 101.41 whereby two or more applicants entitled to comparative consideration of their applications join in one (or more) of the existing applications and request dismissal of their other application (or applications) to avoid the delay and cost of comparative consideration;

(5) The amendment corrects typographical, transcription, or similar clerical errors which are clearly demonstrated to be mistakes by reference to other parts of the application, and whose discovery does not create new or increased frequency conflicts; or

(6) The amendment does not create new or increased frequency conflicts, and is demonstrably necessitated by events which the applicant could not have reasonably foreseen at the time of filing, such as, for example:

(i) The loss of a transmitter or receiver site by condemnation, natural causes, or loss of lease or option;

(ii) Obstruction of a proposed transmission path caused by the erection of a new building or other structure; or

(iii) The discontinuance or substantial technological obsolescence of specified equipment, whenever the application has been pending before the Commission for two or more years from the date of its filing.

(g) Applicants for the 932.5-935/941.5-944 MHz bands shall select a frequency pair. Applicants for these bands may select an unpaired frequency only upon a showing that spectrum efficiency will not be impaired and that unpaired spectrum is not available in other bands. During the initial filing window, frequency coordination is not required, except that an application for a frequency in the 942-944 MHz band must be coordinated to ensure that it does not affect an existing broadcast auxiliary service licensee. After the initial filing window, an applicant must submit evidence that frequency coordination has been performed with all licensees affected by the application. All frequency coordination must be performed in

accordance with § 101.103 of the Commission's Rules. In the event of mutually exclusive applications occurring during the initial filing window for the 932.5-935/941.5-944 MHz bands, applicants shall be given the opportunity to resolve these situations by applying for an alternative frequency pair, if one is available. To the extent that there are no other available frequencies or to the extent that mutually exclusive applications remain after this process is concluded, lotteries shall be conducted for each frequency pair among all remaining mutually exclusive applications, assuming appropriate coordination with existing broadcast auxiliary stations can be concluded, where necessary. In the event of mutually exclusive applications being received for these bands on the same day after the initial filing window has closed and a subsequent filing window opened, lotteries shall be conducted for each frequency pair among all mutually exclusive applications.

§ 101.47 Consideration of applications.

(a) Applications for an instrument of authorization will be granted if, upon examination of the application and upon consideration of such other matters as it may officially notice, the Commission finds that the grant will serve the public interest, convenience, and necessity.

(b) The grant will be without a formal hearing if, upon consideration of the application, any pleadings of objections filed, or other matters which may be officially noticed, the Commission finds that:

(1) The application is acceptable for filing, and is in accordance with the Commission's rules, regulations, and other requirements;

(2) The application is not subject to comparative consideration (pursuant to § 101.45) with another application (or applications), except where the competing applicants have chosen the comparative evaluation procedure of § 101.51 and a grant is appropriate under that procedure;

(3) A grant of the application would not cause harmful electrical interference to an authorized station;

(4) There are no substantial and material questions of fact presented; and

(5) The applicant is legally, technically, financially and otherwise qualified, and a grant of the application would serve the public interest.

(c) Whenever the Commission, without a formal hearing, grants any application in part, or subject to any terms or conditions other than those normally applied to applications of the same type, it will inform the applicant of the reasons therefor, and the grant will be considered final unless the Commission revises its action (either by granting the application as originally requested, or by designating the application for a formal evidentiary hearing) in response to a petition for reconsideration that:

(1) Is filed by the applicant within thirty (30) days from the date of the letter or order giving the reasons for the partial or conditioned grant;

(2) Rejects the grant as made and explains the reasons why the application should be granted as originally requested; and

(3) Returns the instrument of authorization.

(d) The Commission will designate an application for a formal hearing, specifying with particularity the matters and things in issue, if, upon consideration of the application, any pleadings or objections filed, or other matters which may be officially noticed, the Commission determines that:

(1) A substantial and material question of fact is presented;

(2) The Commission is unable for any reason to make the findings specified in paragraph (a) of this section and the application is acceptable for filing, complete, and in accordance with the Commission's rules, regulations, and other requirements.

(3) The application is entitled to comparative consideration (under § 101.45) with another application (or applications); or

(4) The application is entitled to comparative consideration (pursuant to § 101.45) and the applicants have chosen the comparative evaluation procedure of § 101.51 but the Commission deems such procedure to be inappropriate.

(e) The Commission may grant, deny, or take other action with respect to an application designated for a formal hearing pursuant to paragraph (d) of this section or Part 1 of this chapter.

(f) Whenever the public interest would be served thereby the Commission may grant one or more mutually exclusive applications expressly conditioned upon final action on the applications, and then either conduct a random section process (in specified services under this rules part), designate all of the mutually exclusive applications for a formal evidentiary hearing or (whenever so requested) follow the comparative evaluation procedures of § 101.51, as appropriate, if it appears:

(1) That some or all of the applications were not filed in good faith, but were filed for the purpose of delaying or hindering the grant of another application;

(2) That the public interest requires the prompt establishment of radio service in a particular community or area;

(3) That a delay in making a grant to any applicant until after the conclusion of a hearing or a random selection proceeding on all applications might jeopardize the rights of the United States under the provision of an international agreement to the use of the frequency in question; or

(4) That a grant of one application would be in the public interest in that it appears from an examination of the remaining applications that they cannot be granted because they are in violation of provisions of the Communications Act, other statutes, or of the provisions of this chapter.

(g) Reconsideration or review of any final action taken by the Commission will be in accordance with Subpart A of Part 1 of this chapter.

§ 101.49 Grants by random selection.

(a) If an application for an authorization in the Digital Electronic Message Service (DEMS) is

mutually exclusive with another such application and satisfies the requirements of § 101.45, the applicant may be included in the random selection process set forth in §§ 1.821, 1.822 and 1.825 of this chapter.

(b) Renewal applications will not be included in a random selection process.

§ 101.51 Comparative evaluation of mutually exclusive applications.

(a) In order to expedite action on mutually exclusive applications in services under this rules part where the random selection process does not apply, the applicants may request the Commission to consider their applications without a formal hearing in accordance with the summary procedure outlined in paragraph (b) in this section if:

(1) The applications are entitled to comparative consideration pursuant to Sec. 101.45;

(2) The applications have not been designated for formal evidentiary hearing; and

(3) The Commission determines, initially or at any time during the procedure outlined in paragraph (b) of this section, that such procedure is appropriate, and that, from the information submitted and consideration of such other matters as may be officially noticed, there are no substantial and material questions of fact presented (other than those relating to the comparative merits of the applications) which would preclude a grant under paragraphs (a) and (b) of § 101.47.

(b) Provided that the conditions of paragraph (a) of this section are satisfied, applicants may request the Commission to act upon their mutually exclusive applications without a formal hearing pursuant to the summary procedure outlined below:

(1) To initiate the procedure, each applicant will submit to the Commission a written statement containing:

(i) A waiver of the applicant's right to a formal hearing;

(ii) A request and agreement that, in order to avoid the delay and expense of a comparative formal hearing, the Commission should exercise its judgment to select from among the mutually exclusive applications that proposal (or proposals) which would best serve the public interest; and

(iii) The signature of a principal (and the principal's attorney if represented).

(2) After receipt of the written requests of all of the applicants the Commission (if it deems this procedure appropriate) will issue a notice designating the comparative criteria upon which the applications are to be evaluated and will request each applicant to submit, within a specified period of time, additional information concerning the applicant's proposal relative to the comparative criteria.

(3) Within thirty (30) days following the due date for filing this information, the Commission will accept concise and factual argument on the competing proposals from the rival applicants, potential customers, and other knowledgeable parties in interest.

(4) Within fifteen (15) days following the due date for the filing of comments, the

Commission will accept concise and factual replies from the rival applicants.

(5) From time to time during the course of this procedure the Commission may request additional information from the applicants and hold informal conferences at which all competing applicants will have the right to be represented.

(6) Upon evaluation of the applications, the information submitted, and such other matters as may be officially noticed the Commission will issue a decision granting one (or more) of the proposals which it concludes would best serve the public interest, convenience and necessity. The decision will report briefly and concisely the reasons for the Commission's selection and will deny the other application(s). This decision will be considered final.

License Transfers, Modifications, Conditions and Forfeitures

§ 101.53 Assignment or transfer of station authorization.

(a) No station license, or any rights thereunder, may be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation or any other entity holding any such license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience and necessity will be served thereby.

(b) For purposes of this section, transfers of control requiring Commission approval must include any and all transactions that:

(1) Change the party controlling the affairs of the licensee, or

(2) Affect any change in a controlling interest in the ownership of the licensee, including changes in legal or equitable ownership, or

(c) Requests for transfer of control or assignment authority must be submitted on the application form prescribed by § 101.17 of this chapter, and must be accompanied by the applicable showings required by §§ 101.19, 101.21, and 101.55 of this chapter.

(d) The Commission must be promptly notified in writing when a licensee is voluntarily or involuntarily placed in bankruptcy or receivership and when an individual licensee, a member of a partnership which is a licensee, or a person directly or indirectly in control of a corporation which is a licensee, dies or becomes legally disabled. Within thirty days after the occurrence of such bankruptcy, receivership, death or legal disability, an application of involuntary assignment of such license, or involuntary transfer of control of such corporation, must be filed with the Commission, requesting assignment or transfer to a successor legally qualified under the laws of the place having jurisdiction over the assets involved.

(e) The assignor of a station licensed under this part may retain no right of reversion or reassignment of the license and may not reserve the right to use the facilities of the station for any period whatsoever. No assignment of license will be granted or authorized if there is a contract or understanding, express or implied, pursuant to which a right of reversion or reassignment of the license or right to use the facilities are retained as partial or full consideration for the assignment or transfer.

(f) No special temporary authority, or any rights thereunder, may be assigned or otherwise disposed of, directly or indirectly, voluntarily or involuntarily, without prior Commission approval.

§ 101.55 Considerations involving transfer or assignment applications.

(a) Licenses may not be assigned or transferred prior to the completion of construction of the facility. However, consent to the assignment or transfer of control of such a license may be given prior to the completion of construction where:

(1) The assignment or transfer does not involve a substantial change in or ownership or control of the authorized facilities; or in

(2) The assignment or transfer of control is involuntary due to the licensee's bankruptcy, death, or legal disability.

(b) The Commission will review a proposed transaction to determine if the circumstances indicate "trafficking" in licenses whenever applications (except those involving pro forma assignment or transfer of control) for consent to assignment of a license, or for transfer of control of a licensee, involve facilities that were:

(1) Authorized following a comparative hearing and have been operated less than one year, or;

(2) Involve facilities that have not been constructed, or;

(3) Involve facilities that were authorized following a random selection proceeding in which the successful applicant received preference and that have been operated for less than one year.

At its discretion, the Commission may require the submission of an affirmative, factual showing (supported by affidavits of a person or persons with personal knowledge thereof) to demonstrate that the proposed assignor or transferor has not acquired an authorization or operated a station for the principal purpose of profitable sale rather than public service. This showing may include, for example, a demonstration that the proposed assignment or transfer is due to changed circumstances (described in detail) affecting the licensee subsequent to the acquisition of the license, or that the proposed transfer of radio facilities is incidental to a sale of other facilities or merger of interests.

(c) If a proposed transfer of radio facilities is incidental to a sale of other facilities or merger of interests, any showing requested under paragraph (a) of this section must include an additional exhibit that:

(1) Discloses complete details as to the sale of facilities or merger of interests;

(2) Segregates clearly by an itemized accounting, the amount of consideration involved in the sale of facilities or merger of interests; and

(3) Demonstrates that the amount of consideration assignable to the facilities or business interests involved represents their fair market value at the time of the transaction.

(d) For the purposes of this section, the one year period is calculated using the following dates

(as appropriate):

(1) The initial date of grant of the license, excluding subsequent modifications;

(2) The date of consummation of an assignment or transfer, if the station is acquired as the result of an assignment of license, or transfer of control of corporate licensee; or

(3) The median date of the applicable commencement dates (determined pursuant to paragraphs (d) (1) and (2) of this section) if the transaction involves a system (such as a Point-to-Point Microwave System) of two or more stations. (The median date is that date so selected such that fifty percent of the commencement dates of the total number of stations, when arranged in chronological order, lie below it and fifty percent lie above it. When the number of stations is an even number, the median date will be a value half way between the two dates closest to the theoretical median).

§ 101.57 Modification of station license.

(a) Except as provided in § 101.59, no modification of a license issued pursuant to this part (or the facilities described thereunder) may be made except upon application to the Commission.

(b) No application for modification to extend a license construction period will be granted for delays caused by lack of financing or for lack of site availability. Applications for time extensions for other reasons must include a verified statement from the applicant showing that the licensee has made diligent efforts to construct the facilities and:

(1) That additional time is required due to circumstances beyond the applicant's control, in which case the applicant must describe such circumstances and must set forth with specificity and justify the precise extension period requested; or

(2) That there are unique and overriding public interest concerns that justify such an extension, in which case the applicant must identify such interests and must set forth and justify a precise extension period.

(c) Notwithstanding the provisions of paragraph (b), when a station license has been assigned or transferred pursuant to § 101.53, any extension of time will be limited so that the time left to construct after Commission grant of the transfer or assignment will be no more than the time remaining for construction at the date of the filing of the application for transfer or assignment.

(d) Modification of license is required for the following changes in authorized stations:

(1) Any change in frequencies used;

(2) Any change in antenna azimuth;

(3) Any change in antenna beamwidth;

(4) Any change in antenna or passive repeater location greater than 1 second or which involves a requirement for special aeronautical study;

(5) Any change in antenna polarization;

(6) Any change in antenna height;

(7) Any change in the size of passive reflectors or repeaters associated with the facilities of an authorized station;

(8) Any increase in emission bandwidth beyond that authorized;

(9) Any change in the type of emission;

(10) Any change in authorized effective radiated power in excess of 3 dB (a 2-to-1 ratio);

(11) Substitution of equipment having different frequency tolerance.

(e) When the name of the licensee is changed (without changes in the ownership, control, or corporate structure), or when the mailing address is changed (without changing the authorized location of the fixed station) a formal application for modification of license is not required. However, the licensee must notify the Commission within thirty days of the effective date of these changes. The notice, which may be in letter form, must contain the name and address of the licensee as they appear in the Commission's records, the new name or address, the call signs and classes of all radio stations authorized to the licensee under this part and the radio service in which each station is authorized. The notice must be sent to the Federal Communications Commission, Gettysburg, PA 17325 and a copy must be maintained with the license of each station until a new license is issued.

§ 101.59 Processing of applications for facility minor modifications.

(a) Unless an applicant is notified to the contrary by the Commission, as of the twenty-first day following the date of public notice, any application that meets the requirements of paragraph (b) of this section and proposes only the change specified in paragraph (c) of this section will be deemed to have been authorized by the Commission.

(b) An application may be considered under the procedures of this section only if:

(1) It is in the Point-to-Point Microwave Radio, Local Television Transmission, or Digital Electronic Message Service;

(2) The cumulative effect of all such applications made within any 60 days period does not exceed the appropriate values prescribed by paragraph (c) of this section;

(3) The facilities to be modified are not located within 56.3 kilometers (35 miles) of the Canadian or Mexican border;

(4) It is acceptable for filing, is consistent with all of the Commission's rules, and does not involve a waiver request;

(5) It specifically requests consideration pursuant to this section; and

(6) Frequency coordination procedures, as necessary, are complied with in accordance with § 101.103(d) or, in the Digital Electronic Message Services, a copy of the application has been served on those who also were served under § 101.509.

(c) The modifications that may be authorized under the procedures of this section are:

(1) Changes in a transmitter and existing transmitter operating characteristics, or protective configuration of transmitter, provided that:

(i) In all radio services other than Digital Electronic Message Service, any increase in transmitter output power is less than three dB over the previously authorized output power; and in Digital Electronic Message Service, any increase in transmitter output power is one and one-half dB or less over the previously authorized output power;

(ii) The necessary bandwidth is not increased beyond the previously authorized bandwidth;

(2) Changes in the center line height of an antenna, provided that:

(i) In all radio services except the Digital Electronic Message Service, any increase in antenna height is less than 6.1 meters (20 feet) above the previously authorized height;

(ii) In Digital Electronic Message Service, any increase in antenna height is less than 3.0 meters (10 feet) above the previously authorized height; and

(iii) The overall height of the antenna structure is not increased as a result of the antenna extending above the height of the previously authorized structure, except when the new height of the antenna structure is 6.1 meters (20 feet) or less (above ground or man-made structure, as appropriate) after the change is made.

(3) Change in the geographical coordinates of a transmit station, receive station or passive facility by five (5) seconds or less of latitude, longitude or both, provided that when notice to the FAA of proposed construction is required by Part 17 of the rules for antenna structure at the previously authorized coordinates (or will be required at the new location) the applicant must comply with the provisions of § 101.21(a).

(d) Upon grant of an application under the procedure of this section and at such time that construction begins, the applicant must keep a complete copy of the application (including the filing date) with the station license if construction begins prior to receipt of the authorization.

§ 101.61 Certain modifications not requiring prior authorization.

(a) Equipment in an authorized radio station may be replaced without prior authorization or notification if the replacement equipment is equivalent to the replaced equipment.

(b) Licensees of fixed stations in the Point-to-Point Microwave Radio, Local Television Transmission, or Digital Electronic Message, may make the facility changes listed in paragraph (c) of this section without obtaining prior Commission authorization, if:

(1) Frequency coordination procedures, as necessary, are complied with in accordance with § 101.103(d) or, in the Digital Electronic Message Services, a copy of the notification described in (b)(3) is served on those who were served under § 101.509, and

(2) The cumulative effect of all facility changes made within any 60 day period does not exceed the appropriate values prescribed by paragraph (c) of this section, and

(3) The Commission is notified of changes made to facilities by the submission of a completed FCC Form 494 within thirty days after the changes are made.

(c) Modifications that may be made without prior authorization under paragraph (b) of this section are:

(1) Change or modification of a transmitter, when:

(i) The replacement or modified transmitter is type-accepted (or type-notified) for use under this Part and is installed without modification from the type-accepted (or type notified) configuration;

(ii) The type of modulation is not changed;

(iii) The frequency stability is equal to or better than the previously authorized frequency stability; and

(iv) The necessary bandwidth and the output power do not exceed the previously authorized values.

(2) Addition or deletion of a transmitter for protection without changing the authorized power output (e.g. hot standby transmitters);

(3) Change to an antenna (other than any change involving a periscope antenna system), when:

(i) For the Point-to-Point Microwave Radio and Local Television Transmission Services, the new antenna conforms to the requirements of § 101.115 and has essentially the same or better radiation characteristics than the previously authorized antenna;

(ii) For the Digital Electronic Message Service, the new antenna conforms with

§ 101.517 and the gain of the new antenna does not exceed that of the previously authorized antenna by more than one dB in any direction.

(4) Any technical changes that would decrease the effective radiated power.

(5) Change to the height of an antenna, when:

(i) The new height (measured at the center-of-radiation) is within +/- 1.5 meters (5 feet) of the previously authorized height; and

(ii) The overall height of the antenna structure is not increased as a result of the antenna extending above the height of the previously authorized structure, except when the new height of the antenna structure is 6.1 meters (20 feet) or less (above ground or man-made structure, as appropriate) after the change is made.

(6) Decreases in the overall height of an antenna structure, provided that, when notice to the FAA of proposed construction was required by Part 17 of the Rules for the antenna structure at the previously authorized height, the applicant must comply with the provisions of § 101.21(a).

(7) Changes in the azimuth of the center of the main lobe of radiation of a point-to-point station's antenna by a maximum of one degree.

(8) Changes to the transmission line and other devices between the transmitter and the antenna when the effective radiated power of the station is not increased by more than one dB.

(d) Licensees may notify the Commission of permissible changes or correct erroneous information on a license not involving a major change (i.e., a change that would be classified as a major amendment as defined by § 101.29) without obtaining prior Commission approval by filing FCC Form 494.

§ 101.63 Period of construction; certification of completion of construction.

(a) Except as provided in paragraphs (b) and (f) of this section, each station authorized under this part must be in operation within 12 months from the initial date of grant. Modification of an operational station must be completed within 12 months of the date of grant of the applicable modification request.

(b) Each station licensed on point-to-multipoint frequencies in the 10.6 GHz and 18 GHz bands must be in operation within 18 months of the initial date of grant. Modification of an operational station must be completed within 18 months of the initial date of grant of the applicable modification request.

(c) Failure to timely begin operation means the authorization cancels automatically and must be returned to the Commission. Neither the capability for transmission nor the transmission of color bars or similar test signals constitutes operation. For purposes of this rule, the transmission of operational traffic, not test or maintenance signals, is necessary and sufficient to constitute operation.

(d) The frequencies associated with all point-to-multipoint authorizations which have cancelled automatically or otherwise been recovered by the Commission will again be made available for reassignment on a date and under terms set forth by Public Notice.

(e) Requests for extension of time to be in operation may be granted upon a showing of good cause, setting forth in detail the applicant's reasons for failure to have the facility operating in the prescribed period. Such requests must be submitted no later than 30 days prior to the end of the prescribed period to the Federal Communications Commission, Gettysburg, PA 17325-7245.

(f) Construction of Common Carrier stations may not commence until the grant of a license, and must be completed by the date specified in the license as the termination date of the construction period. Each licensee must file with the Commission a certification of completion of construction using FCC Form 494A, certifying that the facilities as authorized have been completed and that the station is now operational and ready to provide service to the public, and will remain operational during the license period, unless the license is submitted for cancellation.

§ 101.65 Forfeiture and termination of station authorization.

(a) A common carrier license will be automatically forfeited in whole or in part without further notice to the licensee upon:

(1) The expiration of the construction period specified therein, or after such additional time as may be authorized by the Commission, unless within 5 days after construction period date a certification

of completion of construction has been filed with the Commission pursuant to § 101.63; or

(2) The expiration of the license period specified therein, unless prior thereto an application for renewal of such license has been filed with the Commission; or

(3) The voluntary removal or alteration of the facilities, so as to render the station not operational for a period of 30 days or more.

(b) A license forfeited in whole or in part under the provisions of paragraph (a)(1) or (a)(2) may be reinstated if the Commission, in its discretion, determines that reinstatement would best serve the public interest, convenience and necessity. Petitions for reinstatement filed pursuant to this subsection will be considered only if:

(1) The petition is filed within 30 days of the expiration date set forth in paragraph (a)(1) or (a)(2) of this section, whichever is applicable;

(2) The petition explains the failure to timely file such notification or application as would have prevented automatic forfeiture; and

(3) The petition sets forth with specificity the procedures which have been established to insure timely filings in the future.

(c) A special temporary authorization will automatically terminate upon the expiration date specified therein, or upon failure to comply with any special terms or conditions set forth therein. Operation may be extended beyond such termination date only after application and upon specific authorization by the Commission.

(d) If a station licensed under this part discontinues operation on a permanent basis, the licensee must forward the station license to the Federal Communications Commission, Gettysburg, Pennsylvania 17325, for cancellation. For purposes of this section, any station which has not operated for one year or more is considered to have been permanently discontinued. See Section 101.305 for additional rules regarding temporary and permanent discontinuation of service.

§ 101.67 License period.

(a) Except as provided in paragraph (e) of this Section, licenses for stations authorized under this Part will be issued for a period not to exceed 10 years from date of grant.

(b)The expiration date of developmental licenses will be one year from the date of the grant thereof. When a license is granted subsequent to the last renewal date of the class of license involved, the license will be issued only for the unexpired period of the current license term of such class.

(c) The Commission reserves the right to grant or renew station licenses in these services for a shorter period of time than that generally prescribed for such stations if, in its judgment, public interest, convenience, or necessity would be served by such action.

(d) Upon the expiration or termination of any station license, any related construction permit, which bears a later expiration date, will be automatically terminated concurrently with the related station license, unless it has been determined by the Commission that the public interest, convenience or necessity would be served by continuing in effect said construction permit.

(e) Licenses for Local Television Transmission Service stations that are assigned frequencies allocated to the broadcast services shall terminate simultaneously with the expiration of the authorization for the broadcast station to which such service is rendered.

§ 101.69 Transition of the 2.11-2.13, and 2.16-2.18 GHz bands from Common Carrier Fixed Microwave Services and the 1.85-1.99, 2.13-2.15, and 2.18-2.20 GHz bands from Private Operational Fixed Microwave Service to emerging technologies.

(a) Licensees proposing to implement services using emerging technologies (ET Licensees) may negotiate with Common Carrier and Private Operational Fixed Microwave Service licensees (Existing Licensees) in these bands for the purpose of agreeing to terms under which the Existing Licensees would relocate their operations to other fixed microwave bands or to other media, or alternatively, would accept a sharing arrangement with the ET Licensee that may result in an otherwise impermissible level of interference to the existing licensee's operations. ET Licensees may also negotiate agreements for relocation of the Existing Licensees' facilities within the 2 GHz band in which all interested parties agree to the relocation of the Existing Licensee's facilities elsewhere within these bands. "All interested parties" includes the incumbent licensee, the emerging technology provider or representative requesting and paying for the relocation, and any emerging technology licensee of the spectrum to which the incumbent's facilities are to be relocated.

(b) Common Carrier and Private Operational Fixed Microwave licensees, with the exception of public safety facilities defined in paragraph (f) of this section, in bands allocated for licensed emerging technology services will maintain primary status in these bands until two years after the Commission commences acceptance of applications for an emerging technology services (two-year voluntary negotiation period), and until one year after an emerging technology service licensee initiates negotiations for relocation of the fixed microwave licensee's operations (one-year mandatory negotiation period) or, in bands allocated for unlicensed emerging technology services, until one year after an emerging technology unlicensed equipment supplier or representative initiates negotiations for relocation of the fixed microwave licensee's operations (one-year mandatory negotiation period). When it is necessary for an emerging technology provider or representative of unlicensed device manufacturers to negotiate with a fixed microwave licensee with operations in spectrum adjacent to that of the emerging technology provider, the transition schedule of the entity requesting the move will apply. Public safety facilities defined in paragraph (f) of this section will maintain primary status in these bands until four years after the Commission commences acceptance of applications for an emerging technology service (four-year voluntary negotiation period), and until one year after an emerging technology service licensee or an emerging technology unlicensed equipment supplier or representative initiates negotiations for relocation of the fixed microwave licensee's operations (one-year mandatory negotiation period).

(c) The Commission will amend the operation license of the fixed microwave operator to secondary status only if the following requirements are met:

(1) The service applicant, provider, licensee, or representative using an emerging technology guarantees payment of all relocation costs, including all engineering, equipment, site and FCC fees, as well as any reasonable, additional costs that the relocated fixed microwave licensee might incur as a result of operation in another fixed microwave band or migration to another medium;

(2) The emerging technology service entity completes all activities necessary for implementing the replacement facilities, including engineering and cost analysis of the relocation procedure and, if radio facilities are used, identifying and obtaining, on the incumbents' behalf, new microwave frequencies and frequency coordination; and

(3) The emerging technology service entity builds the replacement system and tests it for comparability with the existing 2 GHz system.

(d) The 2 GHz microwave licensee is not required to relocate until the alternative facilities are available to it for a reasonable time to make adjustments, determine comparability, and ensure a seamless handoff.

(e) If within one year after the relocation to new facilities the 2 GHz microwave licensee demonstrates that the new facilities are not comparable to the former facilities, the emerging technology service entity must remedy the defects or pay to relocate the microwave licensee back to its former or equivalent 2 GHz frequencies.

(f) Public safety facilities subject to the four-year voluntary and one-year mandatory negotiation periods, are those that the majority of communications carried are used for police, fire, or emergency medical services operations involving safety of life and property. The facilities within this exception are those facilities currently licensed on a primary basis pursuant to the eligibility requirements of § 90.19, Police Radio Service; § 90.21, Fire Radio Service; § 90.27 Emergency Medical Radio Service; and Subpart C of Part 90, Special Emergency Radio Services. Licensees of other Part 101 facilities licensed on a primary basis under the eligibility requirements of Part 90, Subparts B and C, are permitted to request similar treatment upon demonstrating that the majority of the communications carried on those facilities are used for operations involving safety of life and property.

Subpart C - Technical Standards

§ 101.101 Frequency availability.

Frequency Band (MHz)	RADIO SERVICE				
	Common Carrier (Part 101)	Private Radio (Part 101)	Broadcast Auxiliary (Part 74)	Other (Parts 15, 21 24, 74, & 78)	Notes
928 - 929		MAS			
932.0 - 932.5	MAS	MAS			*
932.5 - 935.0	PPMS	OFS			*
941.0 - 941.5		MAS			*
941.5 - 944.0	PPMS	OFS	Aural BAS		*
952 - 960		OFS/MAS			
1850 - 1990		OFS		PCS	
2110 - 2130	PPMS			PCS	
2130 - 2150		OFS		PCS	
2150 - 2160		OFS		MDS	
2160 - 2180	PPMS			PCS	
2180 - 2200		OFS		PCS	
2450 - 2500		OFS	TV BAS		F/M/TF
2650 - 2690		OFS		MDS/ITFS	
3700 - 4200	PPMS,LTTS	OFS			
5925 - 6425	PPMS,LTTS	OFS			
6425 - 6525	LTTS	OFS	TV BAS	CARS	M
6525 - 6875	PPMS	OFS			
10,550 - 10,680	PPMS,DEMS	OFS,DTS			
10,700 - 11,700	PPMS	OFS			
11,700 - 12,200	LTTS	OFS			
12,200 - 12,700		OFS			
12,700 - 13,250	PPMS	OFS	TV BAS	CARS	F/M/TF
14,200 - 14,400	LTTS				
17,700 - 18,580	PPMS	OFS	TV BAS	CARS	
18,580 - 18,820	PPMS	OFS	Aural BAS	CARS	
18,820 - 18,920	DEMS	OFS			
18,920 - 19,160		OFS	Aural BAS		
19,160 - 19,260	DEMS	OFS			
19,260 - 19,700	PPMS	OFS	TV BAS	CARS	
21,200 - 23,600	PPMS,LTTS	OFS			TF
27,500 - 29,500	PPMS				
31,000 - 31,300	PPMS,LTTS	OFS		CARS	F/M/TF
38,600 - 40,000	PPMS	OFS	TV BAS		F/M/TF

BAS: Broadcast Auxiliary Service
CARS: Cable Television Relay Service
DEMS: Digital Electronic Message Service
LTTS: Local Television Transmission Service
MAS: Multiple Address System

MDS: Multipoint Distribution Service
OFS: Private Operational Fixed Service
PCS: Personal Communications Service
PPMS: Point-to-Point Microwave Service

Notes:

F - Fixed
M - Mobile
TF - Temporary Fixed
* - Applications for frequencies in the 932.5-935/941.5-944 MHz bands may be filed initially during a one-week period to be announced by public notice. After these applications have been processed, the Commission will announce by public notice a filing date for remaining frequencies. From this filing date forward, applications will be processed on a daily first-come, first-served basis.

§ 101.103 Frequency coordination procedures.

(a) Assignment of frequencies will be made only in such a manner as to facilitate the rendition of communication service on an interference-free basis in each service area. Unless otherwise indicated, each frequency available for use by stations in these services will be assigned exclusively to a single applicant in any service area. All applicants for, and licensees of, stations in these services must cooperate in the selection and use of the frequencies assigned in order to minimize interference and thereby obtain the most effective use of the authorized facilities. In the event harmful interference occurs or appears likely to occur between two or more radio systems and such interference cannot be resolved between the licensees thereof, the Commission may specify a time sharing arrangement for the stations involved or may, after notice and opportunity for hearing, require the licensees to make such changes in operating techniques or equipment as it may deem necessary to avoid such interference.

(b) The provisions of this section do not apply to operations in the band 31.0 to 31.3 GHz. Operations in this band are unprotected and subject to harmful interference from other licensed operations in this band.

(c) Frequency diversity transmission will not be authorized in these services in the absence of a factual showing that the required communications cannot practically be achieved by other means. Where frequency diversity is deemed to be justified on a protection channel basis, it will be limited to one protection channel for the bands 3,700-4,200, 5925-6425, and 6525-6875 MHz, and a ratio of one protection channel for three working channels for the bands 10,550-10,680 and 10,700-11,700 MHz. In the bands 3,700-4,200, 5,925-6,425, and 6525-6875 MHz, no frequency diversity protection channel will be authorized unless there is a minimum of three working channels, except that where a substantial showing is made that a total of three working channels will be required within three years, a protection channel may be authorized simultaneously with the first working channel. A protection channel authorized under such exception will be subject to termination if applications for the third working channel are not filed within three years of the grant date of the applications for the first working channel. Where equipment employing digital modulation techniques with cross-polarized operation on the same frequency is used, the protection channel authorized under the above conditions may be considered to consist of both polarizations of the protection frequency where such is shown to be necessary.

(d) Frequency coordination. When required, the following frequency usage coordination procedures will apply.

(1) General requirements. Proposed frequency usage must be prior coordinated with existing users in the area, and other applicants with previously filed applications, whose facilities could affect or be affected by the new proposal in terms of frequency interference on active channels, applied-for channels, or channels coordinated for future growth. Coordination must be completed prior to filing an application for regular authorization, or an amendment to a pending application, or a modification to a license. In coordinating frequency usage with stations in the fixed satellite service, applicants must also comply with the requirements of Sec. 101.713(c) and (d). In engineering a system or modification thereto, the applicant must, by appropriate studies and analyses, select sites, transmitters, antennas and frequencies that will avoid interference in excess of permissible levels to other users. All applicants and licensees must cooperate fully and make reasonable efforts to resolve technical problems and conflicts that may inhibit the most effective and efficient use of the radio spectrum; however, the party being coordinated with is not obligated to suggest changes or re-engineer a proposal in cases involving conflicts. Applicants should make every reasonable effort to avoid blocking the growth of systems as prior coordinated. The applicant must identify in the application all entities with which the technical proposal was coordinated. In the event that technical problems are not resolved, an explanation must be submitted with the application. Where technical problems are resolved by an agreement or operating arrangement between the parties that would require special procedures be taken to reduce the likelihood of interference in excess of permissible levels (such as the use of artificial site shielding)or would result in a reduction of quality or capacity of either system, the details thereof may be contained in the application.

(2) Coordination procedure guidelines are as follows:

(i) Coordination involves two separate elements: notification and response. Both or either may be oral or in written form. To be acceptable for filing, all applications and major technical amendments must certify that coordination, including response, has been completed. The names of the users with coordinated proposals, applicants, permittees, and licensees with which coordination was accomplished must be specified.

(ii) Notification must include relevant technical details of the proposal. At minimum, this should include, as applicable, the following:

Applicant's name.
Transmitting station name.
Transmitting station coordinates.
Frequencies and polarizations to be added or changed.
Transmitting equipment type, its stability, actual output power, emission designator, and type of modulation (loading).
Transmitting antenna type and model and, if required, a radiation pattern provided or certified by the manufacturer.
Transmitting antenna center line height above ground level and ground elevation above mean sea level.
Receiving station name.
Receiving station coordinates.
Receiving antenna type, model, gain, and, if required, a radiation pattern provided by the manufacturer.
Receiving antenna center line height above ground level and ground elevation above mean sea level.
Forward and reverse path azimuth and distance.

(iii) For transmitters employing digital modulation techniques, the notification should clearly identify the type of modulation. Upon request, additional details of the operating characteristics of the equipment must also be furnished.

(iv) Response to notification should be made as quickly as possible, even if no technical problems are anticipated. Any response to notification indicating potential interference must specify the technical details and must be provided to the applicant, in writing, within the 30-day notification period. Every reasonable effort should be made by all applicants, permittees and licensees to eliminate all problems and conflicts. If no response to notification is received within 30 days, the applicant will be deemed to have made reasonable efforts to coordinate and may file its application without a response.

(v) The 30-day notification period is calculated from the date of receipt by the applicant, permittee, or licensee being notified. If notification is by mail, this date may be ascertained by:

(A) The return receipt on certified mail,
(B) The enclosure of a card to be dated and returned by the recipient, or (C) A conservative estimate of the time required for the mail to reach its destination.

In the latter case, the estimated date when the 30-day period would expire should be stated in the notification.

(vi) An expedited prior coordination period (less than 30 days) may be requested when deemed necessary by a notifying carrier. The coordination notice should be identified as "expedited" and the requested response date should be clearly indicated. However, circumstances preventing a timely response from the receiving carrier should be accommodated accordingly. It is the responsibility of the notifying carrier to receive written concurrence (or verbal, with written to follow) from affected parties or their coordination representatives.

(vii) All technical problems that come to light during coordination must be resolved unless a statement is included with the application to the effect that the applicant is unable or unwilling to resolve the conflict and briefly the reason therefor.

(viii) Where a number of technical changes become necessary for a system during the course of coordination, an attempt should be made to minimize the number of separate notifications for these changes. Where the changes are incorporated into a completely revised notice, the items that were changed from the previous notice should be identified. When changes are not numerous or complex, the carrier receiving the changed notification should make an effort to respond in less than 30 days. When the notifying carrier believes a shorter response time is reasonable and appropriate, it may be helpful for that carrier to so indicate in the notice and perhaps suggest a response date.

(ix) If, after coordination is successfully completed, it is determined that a subsequent change could have no impact on some carriers receiving the original notification, these carriers must be notified of the change and of the coordinator's opinion that no response is required.

(x) Applicants, permittees and licensees should supply to all other applicants, permittees and licensees within their areas of operations, the name, address and telephone number of their coordination representatives. Upon request from coordinating applicants, permittees and licensees, data and information concerning existing or proposed facilities and future growth plans in the area of interest should be furnished unless such request is unreasonable or would impose a significant burden in compilation.

(xi) Carriers should keep other carriers with whom they are coordinating advised of changes in plans for facilities previously coordinated. If applications have not been filed 6 months after coordination was initiated, carriers may assume that such frequency use is no longer desired unless a second notification has been received within 10 days of the end of the 6 month period. Renewal notifications are to be sent to all originally notified parties, even if coordination has not been

successfully completed with those parties.

(xii) Any frequency reserved by a licensee for future use in the bands subject to this Part must, upon a showing by another licensee that it requires an additional frequency and cannot coordinate one that is not reserved for future use, file for the frequency within six (6) months after receiving such a showing or release the frequency for use by the requesting licensee.

(e) Where frequency conflicts arise between co-pending applications in the Point-to-Point Microwave Radio and Local Television Transmission Services, it is the obligation of the later filing applicant to amend his application to remove the conflict, unless it can make a showing that the conflict cannot be reasonably eliminated. Where a frequency conflict is not resolved and no showing is submitted as to why the conflict cannot be resolved, the Commission may grant the first filed application and dismiss the later filed application(s) after giving the later filing applicant(s) 30 days to respond to the proposed action.

(f) When the proposed facilities are to be operated in the band 12,500-12,700 MHz, applications must also follow the procedures in § 101.713 of this Part and the technical standards and requirements of Part 25 of this Chapter as regards licensees in the Communication-Satellite Service.

§ 101.105 Interference protection criteria.

(a) The interference protection criteria for fixed stations subject to this Part are as follows:

(1) To long-haul analog systems, employing frequency modulated radio and frequency division multiplexing to provide multiple voice channels, the allowable interference level per exposure:

(i) Due to co-channel sideband-to-sideband interference must not exceed 5 pwpO (Picowatts of absolute noise power psophometrically weighted (pwpO), appearing in an equivalent voice band channel of 300-3400 Hz).

(ii) Due to co-channel carrier-beat interference must not exceed 50 pwpO.

(2) To short-haul analog systems employing frequency modulated radio and frequency division multiplexing to provide multiple voice channels, the allowable interference level per exposure:

(i) Due to co-channel sideband-to-sideband interference must not exceed 25 pwpO except in the 952-960 MHz band interference into single link fixed relay and control stations must not exceed 250 pwpO per exposure.

(ii) Due to co-channel carrier-beat interference must not exceed 50 pwpO except in the 952-960 MHz band interference into single link fixed relay and control stations must not exceed 1000 pwpO per exposure.

(3) FM-TV. In analog systems employing frequency modulated radio that is modulated by a standard, television (visual) signal, the allowable interference level per exposure may not exceed the levels which would apply to a long-haul or short-haul FM-FDM systems, as outlined in paragraphs (b)(1) and (2) of this section, having a 600-1200 voice channel capacity.

(b) In addition to the requirements of paragraph (a) of this Section the adjacent channel interference protection criteria to be afforded, regardless of system length, or type of modulation, multiplexing, or frequency band, must be such that the interfering signal does not produce more than 1.0 dB degradation of the practical threshold of the protected receiver.

(c) Applying the Criteria.

(1) Guidelines for applying the interference protection criteria for fixed stations subject to this Part are specified in TIA Telecommunications Systems Bulletin TSB 10, "Interference Criteria for Microwave Systems" (TSB 10). Other procedures that follow generally acceptable good engineering practices are also acceptable to the Commission.

(2) If TSB 10 guidelines cannot be used, the following interference protection criteria may be used by calculating the ratio in dB between the desired (carrier signal) and the undesired (interfering) signal (C/I ratio) appearing at the input to the receiver under investigation (victim receiver):

(i) Except as provided in § 101.605 of this Part, where the applicants proposed facilities are of a type not included in paragraphs (a) and (b) of this section or where the development of the carrier-to-interference (C/I) ratio is not covered by generally acceptable procedures, or where the applicant does not wish to develop the carrier-to-interference ratio, the applicant must, in the absence of criteria or a developed C/I ration, employ the following C/I protection ratios:

Co-channel interference: both sideband and carrier-beat, applicable to all bands; the existing or previously authorized system must be afforded a carrier to interfering signal protection ratio of at least 90 dB except in the 952-960 MHz band where it must be 75 dB.

Adjacent channel interference: applicable to all bands; the existing or previously authorized system must be afforded a carrier to interfering signal protection ratio of at least 56 dB.

(3) Applicants for frequencies listed in Sec. 101.605(a)(1) must make the following showings that protection criteria have been met over the entire service area of existing systems. Such showings may be made by the applicant or may be satisfied by a statement from a Frequency Advisory Committee. For frequencies available to more than one service, the Frequency Advisory Committee must affirmatively show that coordination with similar Committees for the other services has been accomplished.

(i) For multiple address stations in the 928-929/952-960 MHz bands, a statement that the proposed system complies with the following co-channel separations from all existing stations and pending applications:

Fixed-to-fixed	145 km (90 miles)
Fixed-to-mobile	113 km (70 miles)
Mobile-to-mobile	81 km (50 miles)

Multiple address systems employing only remote stations will be treated as mobile for the purposes of determining the appropriate separation. For mobile operation, the mileage is measured from the reference point specified on the license application.

(ii) For multiple address stations in the 932-932.5/941-941.5 MHz bands, a statement that the proposed system complies with the following co-channel separation from all existing stations and pending applications:

Fixed-to-fixed	113 Km (70 miles)

(iii) In cases where the geographic separation standard in paragraphs (c)(4)(i) and (c)(4)(ii) of this section are not followed, an engineering analysis will be submitted to show the coordination of the proposed assignment with existing systems located closer than those standards.

The engineering analyses will include:

(A) Specification of the interference criteria and system parameters used in the interference study.

(B) Nominal service areas of each system included in the interference analysis.

(C) Modified service areas resulting from the proposed system. The propagation models used to establish the service boundary limits must be specified and any special terrain features considered in computing the interference impact should be described.

(D) A statement that all parties affected have agreed to the engineering analysis and will accept the calculated levels of interference.

(5) Multiple address frequencies in the 956 MHz band may be assigned for use by mobile master stations on a primary basis. Multiple address frequencies in the 952 MHz band may be assigned for use by mobile master stations on a case-by-case basis. Mobile operation in the 952 MHz band will be on a secondary basis to fixed operations.

(6) Each application for new or modified nodal station on channels numbered 4A, 4B, 7, 9, and 19/20 in the 10.6 GHz band and all point-to-multipoint channels in the 18 GHz band must demonstrate that all existing co-channel stations are at least 56 kilometers from the proposed nodal station site. Applicants for these channels must certify that all licensees and applicants for stations on the adjacent channels within 56 kilometers of the proposed nodal station have been notified of the proposed station and do not object. Alternatively, or if one of the affected adjacent channel interests does object, the applicant may show that all affected adjacent channel parties are provided a C/I protection ratio of 0 dB. An applicants proposing to operate at an AAT greater than 91 meters must reduce its EIRP in accordance with the following table; however, in no case may EIRP exceed 70 dBm on the 10.6 GHz channels.

AAT (meters)	EIRP dBm
Above 300	+38
251 to 300	41
201 to 250	43
151 to 200	49
101 to 150	55
100 and below	85

(7) Each application for new or modified nodal station on channels numbered 21, 22, 23, and 24 in the 10.6 GHz band must include an analysis of the potential for harmful interference to all other licensed and previously applied for co-channel and adjacent channel station located within 80 kilometers of the location of the proposed station. The criteria contained in § 101.103(d)(3) must be used in this analysis. Applicants must certify that copies of this analysis have been served on all parties which might reasonably be expected to receive interference above the levels set out in § 101.103(d)(3) within 5 days of the date the subject application is filed with the Commission.

(d) An applicant filing for a modification of an existing station under the provisions of § 101.31 need not perform the interference protection analyses required by this section if the only modifications made to the station are one or more of the following:

(1) Substitution of transmitting equipment having equal or tighter frequency tolerance.

(2) Any decrease in antenna primary lobe beamwidth which is accompanied by a corresponding decrease in antenna input power so as to not increase the effective radiated power in excess of 3dB (a 2 to 1 ratio).

(3) Any decrease in antenna height or transmitter output power.

(e) Effective August 1, 1985, when a fixed station that conforms to the technical standards of this subpart (or, in the case of the 12.200-12,700 MHz band, a direct broadcast satellite station) receives or will receive interference in excess of the levels specified in this section as a result of an existing licensee's use of non-conforming equipment authorized between July 20, 1961 and July 1, 1976, and the interference would not result if the interfering station's equipment complied with the current technical standards, the licensee of the non-conforming station must take whatever steps are necessary to correct the situation up to the point of installing equipment which fully conforms to the technical standards of this subpart. In such cases, if the engineering analysis demonstrates that (1) the conforming station would receive interference from a non-conforming station in excess of the levels specified in this section and (2) the interference would be eliminated if the non-conforming equipment were replaced with equipment which complies with the standards of this subpart, the licensee (or prospective licensee) of the station which would receive interference must provide written notice of the potential interference to both the non-conforming licensee and the Commission's office in Gettysburg, PA. The non-conforming licensee must make all required equipment changes within 180 days from the date of official Commission notice informing the licensee that it must upgrade its equipment, unless an alternative solution has been agreed to by all parties involved in the interference situation. If a non-conforming licensee fails to make all required changes within the specified period of time, the Commission may require the licensee to suspend operation until the changes are completed.

§ 101.107 Frequency tolerance.

(a) The carrier frequency of each transmitter authorized in these services must be maintained within the following percentage of the reference frequency except as otherwise provided in paragraph (b) of this section or in the applicable subpart of this part (unless otherwise specified in the instrument of station authorization the reference frequency will be deemed to be the assigned frequency):

	Frequency tolerance (percent)		
Frequency (MHz)	All fixed and base stations	Mobile stations over 3 watts	Mobile stations 3 watts oe less
928 to 929 /2//5/	0.0005		
932 to 932.5 /2/	0.00015		
932.5 to 935 /2/	0.00025		
941 to 941.5	0.00015		
941.5 to 944	0.00025		
952 to 960 /7/			
944 to 1,000	0.0005	0.0005	0.0005
1,850 to 1,990	0.002		
2,110 to 2,200	0.001		
2,200 to 12,200 /1/	0.005	0.005	0.005
2,450 to 2,500	0.001		
6,425 to 6,875	0.005		

10,550 to 10,680	0.0003		
12,200 to 13,150 /6/	0.005		
12,200 to 17,700	0.03	0.03	0.03
17,700 to 18,820/4//5/	0.003		
18,820 to 18,920 /4//5/	0.001		
18,920 to 19,700 /4//5/	0.003		
19,700 to 40,000 /6/	0.03	0.03	0.03

/1/ Applicable only to common carrier LTTS stations. Beginning Aug. 9, 1975, this tolerance will govern the marketing of LTTS equipment and the issuance of all such authorizations for new radio equipment. Until that date new equipment may be authorized with a frequency tolerance of .03 percent in the frequency range 2,200 to 10,500 MHz and .05 percent in the range 10,500 MHz to 12,200 MHz, and equipment so authorized may continue to be used for its life provided that it does not cause interference to the operation of any other licensee.

/2/ Equipment authorized to be operated on frequencies between 890 and 940 MHz as of Oct. 15, 1956, must maintain a frequency tolerance within 0.03 percent subject to the condition that no harmful interference is caused to any other radio station.

/3/ See Subpart G for the stability requirements for transmitters used in the Digital Electronic Message Service.

/4/ Existing type accepted equipment with a frequency tolerance of +/-0.03% may be marketed until December 1, 1988. Equipment installed and operated prior to December 1, 1988 may continue to operate after that date with a minimum frequency tolerance of +/-0.03%. However, the replacement of equipment requires that the +/-0.003% tolerance be met.

/5/ For remote stations with 12.5 kHz bandwidth, the tolerance is ± 0.00015%.

/6/ Applicable to private operational fixed only. For exceptions see § 101.605.

/7/ For private operational fixed point-to-point systems, with a channel greater than or equal to 50 kHz bandwidth, ± 0.0005%; for multiple address master stations, regardless of bandwidth, ±0.00015%; for multiple address remote stations with 12.5 kHz bandwidths, ± 0.00015%; for multiple address remote stations with channels greater than 12.5 kHz bandwidth, ± 0.0005%.

(b) Heterodyne microwave radio systems may be authorized a somewhat less restrictive frequency tolerance (up to .01 percent) to compensate for frequency shift caused by numerous repeaters between base band signal insertion. Where such relaxation is sought, applicant must provide all calculations and indicate the desired tolerance over each path. In such instances the radio transmitters used must individually be capable of complying with the tolerance specified in paragraph (a) of this section.

(c) As an additional requirement in any band where the Commission makes assignments according to a specified channel plan, provisions must be made to prevent the emission included within the occupied bandwidth from radiating outside the assigned channel at a level greater than that specified in § 101.111.

§ 101.109 Bandwidth.

(a) Each authorization issued pursuant to these rules will show, as the emission designator, a symbol

representing the class of emission which must be prefixed by a number specifying the necessary bandwidth. This figure does not necessarily indicate the bandwidth actually occupied by the emission at any instant. In those cases where Part 2 of this chapter does not provide a formula for the computation of the necessary bandwidth, the occupied bandwidth may be used in the emission designator.

(b) Stations in this service will be authorized any type of emission, method of modulation, and transmission characteristic, consistent with efficient use of the spectrum and good engineering practice, except that Type B, damped-wave emission will not be authorized.

§ 101.111 Emission limitations.

(a) The mean power of emissions must be attenuated below the mean output power of the transmitter in accordance with the following schedule:

(1) When using transmissions other than those employing digital modulation techniques:

(i) On any frequency removed from the assigned frequency by more than 50 percent up to and including 100 percent of the authorized bandwidth: At least 25 decibels;

(ii) On any frequency removed from the assigned frequency by more than 100 percent up to and including 250 percent of the authorized bandwidth: At least 35 decibels;

(iii) On any frequency removed from the assigned frequency by more than 250 percent of the authorized bandwidth: At least 43+10 Log10 (mean output power in watts) decibels, or 80 decibels, whichever is the lesser attenuation.

(2) When using transmissions employing digital modulation techniques (see § 101.141(b)) in situations not covered in this section:

(i) For operating frequencies below 15 GHz, in any 4 kHz band, the center frequency of which is removed from the assigned frequency by more than 50 percent up to and including 250 percent of the authorized bandwidth: As specified by the following equation but in no event less than 50 decibels.

A=35+0.8(P-50)+10 Log10B. (Attenuation greater than 80 decibels is not required.)

where:

A=Attenuation (in decibels) below the mean output power level.
P=Percent removed from the carrier frequency.
B=Authorized bandwidth in MHz.

(ii) For operating frequencies above 15 GHz, in any 1 MHz band, the center frequency of which is removed from the assigned frequency by more than 50 percent up to and including 250 percent of the authorized bandwidth: As specified by the following equation but in no event less than 11 decibels.
A=11+0.4(P-50)+10 Log10B. (Attenuation greater than 56 decibels is not required.)

(iii) In any 4 kHz band, the center frequency of which is removed from the assigned frequency by more than 250 percent of the authorized bandwidth: At least 43+10 Log10 (mean output power in watts) decibels, or 80 decibels, whichever is the lesser attenuation.

(3) For Digital Termination System channels used in the Digital Electronic Message Service (DEMS) operating in the 10,550-10,680 MHz band:

(i) In any 4 kHz band, the center frequency of which is removed from the edge of the DEMS channel by up to and including 1.125 times the DEMS subchannel bandwidth: As specified by the following equation may in no event be less than 50+10 log10 N decibels.

A=50+0.0333 (F-0.5B)+10 log10 N decibels

Where:
A=Attenuation (in decibels) below means output power level contained within the DEMS channel for a given polarization.
B=Bandwidth of DEMS channel (in kHz).
F=Absolute value of the difference between the center frequency of the 4 kHz band measured and the center frequency of the DEMS channel (in kHz).
N=Number of active subchannels of the given polarization within the DEMS channel.

(ii) In any 4 kHz band within the authorized DEMS band the center frequency of which is removed from the center frequency of the DEMS channel by more that the sum of 50% of the DEMS channel bandwidth plus 1.125 times the subchannel bandwidth: As specified by the following equation but in no event less than 80 decibels.

A=80+10 log10 N decibels

(iii) In any 4 kHz band the center frequency of which is outside the authorized DEMS band: At least 43+10 log10 (mean output power in Watts) decibels.

(4) For Digital Termination System channels used in the Digital Electronic Message Service (DEMS) operating in the 17,700-19,700 MHz band:

(i) In any 4 kHz band, the center frequency of which is removed from the frequency of the center of the DEMS channel by more than 50 percent of the DEMS channel bandwidth up to and including 50 percent plus 500 kHz: As specified by the following equation but in no event be less than 50+10 log10 N decibels.

A=50+0.06 (F-0.5B)+10 log10 N decibels

Where:
A=Attenuation (in decibels) below mean output power level contained within the DEMS channel for a given polarization.
B=Bandwidth of DEMS channel (in kHz).
F=Absolute value of the difference between the center frequency of the 4 kHz band measured and the center frequency of the DEMS channel (in kHz).
N=Number of active subchannels of the given polarization within the DEMS channel.

(ii) In any 4 kHz band within the authorized DEMS band, the center frequency of which is removed from the center frequency of the DEMS channel by more than the sum of 50 percent of the channel bandwidth plus 500 kHz: as specified by the following equation but in no event less than 80 decibels.

A=80+10 log10 N decibels

(iii) In any 4 kHz band the center frequency of which is outside the authorized Digital Message Service band:

At least 43+10 log10 (mean output power in Watts) decibels.

(5) When using transmissions employing digital modulation techniques on the 900 MHz multiple address frequencies with a 12.5 kHz bandwidth, the power of any emission must be attenuated below the unmodulated carrier power of the transmitter (P) in accordance with the following schedule:

(i) On any frequency removed from the center of the authorized bandwidth by a displacement frequency (fd in kHz) of more than 2.5 kHz up to and including 6.25 kHz: At least 53 log10 (fd/2.5) decibels;

(ii) On any frequency removed from the center of the authorized bandwidth by a displacement frequency (fd in kHz) of more than 6.25 kHz up to and including 9.5 kHz: At least 103 log10 (fd/3.9) decibels;

(iii) On any frequency removed from the center of the authorized bandwidth by a displacement frequency (fd in kHz) of more than 9.5 kHz up to and including 15 kHz: At least 157 log10 (fd/5.3) decibels;

(iv) On any frequency removed from the center of the authorized bandwidth by a displacement frequency greater than 15 kHz: At least 50 plus 10 log10(P) or 70 decibels, whichever is the lesser attenuation.

(4) When using transmissions employing digital modulation techniques on the 900 MHz multiple address frequencies with a bandwidth greater than 12.5 kHz, the power of any emission must be attenuated below the unmodulated carrier power of the transmitter (P) in accordance with the following schedule;

(i) On any frequency removed from the center of the authorized bandwidth by a displacement frequency (fd in kHz) of more than 5 kHz up to and including 10 kHz: At least 83 log10 (fd/5) decibels;

(ii) On any frequency removed from the center of the authorized bandwidth by a displacement frequency (fd in kHz) of more than 10 kHz up to and including 250 percent of the authorized bandwidth: At least 116 log10 (fd/6.1) decibels or 50 plus 10log 10(P) or 70 decibels, whichever is the lesser attenuation;

(iii) On any frequency removed from the center of the authorized bandwidth by more than 250 percent of the authorized bandwidth: At least 43 plus 10 log10(output power in watts) decibels or 80 decibels, whichever is the lesser attenuation.

(b) When an emission outside of the authorized bandwidth causes harmful interference, the Commission may, at its discretion, require greater attenuation than specified in paragraph (a) of this section.

(c) The emission of an unmodulated carrier is prohibited except for test purposes as required for proper station and system maintenance.

§ 101.113 Transmitter power limitations.

(a) On any authorized frequency, the average power delivered to an antenna in this service must be the minimum amount of power necessary to carry out the communications desired. Application of this principle includes, but is not be limited to, requiring a licensee who replaces one or more of its antennas with larger antennas to reduce its antenna input power by an amount appropriate to compensate for the increased primary lobe gain of the replacement antenna(s). In no event shall the average equivalent isotropically radiated power (EIRP), as referenced to an isotropic radiator, exceed the values specified below. In cases of harmful interference, the Commission may, after notice and opportunity for hearing, order a change in the effective radiated power of this station. Further, the output power of a transmitter on any authorized frequency in this service may not exceed the following:

Frequency band (MHz)	Maximum allowable EIRP	
	Fixed (dBW)	Mobile (dBW)
928.0 to 929.0	+17	.....
932.0 to 932.5	+17	.....
932.5 to 935.0	+40	.....
941.0 to 941.5	+30	.....
941.5 to 944.0	+40	.....
952.0 to 960.0	(1)+40	.....
1,850 to 1,990	+45	.....
2,110 to 2,160	(4)+45	.....
2,160 to 2,180	(1)+45	.....
2,180 to 2,200	+45	.....
2,450 to 2,500	+45	.....
2,686 to 2,690	+45	.....
3,700 to 4,200	+55	.....
5,925 to 6,425	+55	.....
6,425 to 6,525	.....	+35
6,525 to 6,875	+55	.....
10,550 to 10,680	(3)+55	.....
10,700 to 11,700	+55	.....
12,200 to 13,250	(4)+50	.....
17,700 to 18,600	+55	.....
18,600 to 18,800	(2)+35	.....
18,800 to 19,700	+55	.....
21,200 to 23,600	(4)+55	.....
27,500 to 29,500	+55	.....
31,000 to 31,300		
38,600 to 40,000	+55	.....

(1) For multiple address operations,see § 101.605(a)(1)(v). When an omnidirectional antenna is authorized in the 2150-2160 MHz band, the maximum power is 60 dBm. Remote alarm units that are part of a multiple address central station protection system are authorized a maximum of 2 watts.

(2) The power delivered to the antenna is limited to -3 dBW.

(3) Output power of a DEMS System nodal transmitter may not exceed 0.5 watts per 250 KHz. The output power of a DEMS System user transmitter may not exceed 0.04 watts per 250 KHz. The transmitter power in terms of the watts specified is the peak envelope power of the emission measured at the associated antenna input power. The operating power may not exceed the authorized power by more

than 10 percent of the authorized power in watts at any time.

(4) Also, see §§ 101.145 and 101.605.

§ 101.115 Directional antennas.

(a) Unless otherwise authorized upon specific request by the applicant, each station authorized under the rules of this part must employ a directional antenna adjusted with the center of the major lobe of radiation in the horizontal plane directed toward the receiving station with which it communicates: *provided, however,* where a station communicates with more than one point, a multi- or omni-directional antenna may be authorized if necessary. New Periscope antenna systems will not, under ordinary circumstances, be authorized.

(b) Stations operating below 2500 MHz that are required to use directional antennas must employ antennas meeting the standards indicated below.
(Maximum beamwidth is for the major lobe of radiation at the half power points. Suppression is the minimum attenuation required for any secondary lobe signal and is referenced to the maximum signal in the main lobe.)

Frequency range	Maximum beamwidth (degrees)	Suppression (dB)
Below 512 MHz	80	10
512 to 1000 MHz	20	13
1500 to 2500 MHz	12	13

(c) Fixed stations (other than temporary fixed stations and DEMS nodal stations) operating at 2,500 MHz or higher must employ transmitting and receiving antennas (excluding second receiving antennas for operations such as space diversity) meeting the appropriate performance Standard A indicated below, except that in areas not subjected to frequency congestion antennas meeting performance Standard B may be used subject to the requirements set forth in paragraph (d) of this Section.

Antenna Standards

				Minimum radiation suppression to angle in degrees from centerline of main beam in decibels						
Frequency (MHz)	Category		Minimum antenna gain (dbi)	——— - 5· to 10·	——— - 10· to 15·	——— - 15· to 20·	——— - 20· to 30·	——— - 30· to 100·	——— - 100· to 140·	——— - 140· to 180·
932.5 to 935	A	14.0	n/a		6	11	14	17	20	24
941.5 to 944	B	20.0	n/a			6	10	13	15	20

952 to 960 (8) (9)	A	14.0	n/a		6	11	14	17	20	24
	B	20.0	n/a			6	10	13	15	20
1,850 to 1,990	A	5.0	n/a	12	18	22	25	29	33	39
	B	8.0	n/a	5	18	20	20	25	28	36
3,700 to 4,200	A	n/a	36	23	29	33	36	42	55	55
	B	n/a	36	20	24	28	32	32	32	32
5,925 to 6,425 (5)	A	n/a	38	25	29	33	36	42	55	55
	B	n/a	38	21	25	29	32	35	39	45
5,925 to 6,425 (6)	A	n/a	38	25	29	33	36	42	55	55
	B	n/a	38	20	24	28	32	35	36	36
6,525 to 6,875 (5)	A	n/a	38	25	29	33	36	42	55	55
	B	n/a	38	21	25	29	32	35	39	45
6,525 to 6,875 (6)	A	1.5	n/a	26	29	32	34	38	41	49
	B	2.0	n/a	21	25	29	32	35	39	45
10,550 to 10,680 (4)	A	n/a	38	25	29	33	36	42	55	55
(5)	B	n/a	38	20	24	28	32	35	35	39
10,550 to 10,680 (6)	A	3.4	34	20	24	28	32	35	55	55
	B	3.4	34	20	24	28	32	35	35	39
10,565 to 10,615 (7)	n/a	360	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
10,630 to 10,680 (7)	n/a	n/a	34	20	24	28	32	35	36	36
10,700 to 11,700 (5)	A	n/a	38	25	29	33	36	42	55	55
	B	n/a	38	20	24	28	32	35	36	36
17,700 to 18,820	A	n/a	38	25	29	33	36	42	55	55
	B	n/a	38	20	24	28	32	35	36	36
18,920 to 19,700 (1)	A	n/a	38	25	29	33	36	42	55	55
	B	n/a	38	20	24	28	32	35	36	36
21,200 to 23,600 (10)	A	n/a	38	25	29	33	36	42	55	55
	B	n/a	38	20	24	28	32	35	36	36
31,000 to 31,300 (2) (3)	n/a	4.0	38	n/a	n/a	n/a	n/a	n/a	n/a	n/a
Above 31,300	A	n/a	38	25	29	33	36	42	55	55
	B	n/a	38	20	24	28	32	35	36	36

(1) DEMS User Station antennas in this band must meet performance Standard B and have a minimum antenna gain of 34 dBi. The maximum beamwidth requirement does not apply to DEMS User

Stations. DEMS Nodal Stations need not comply with these standards.

(2) The minimum front-to-back ratio must be 38 dBi.

(3) Mobile, except aeronautical mobile, stations need not comply with these standards.

(4) Except for antennas between 140° and 180° authorized or pending on January 1, 1989, in the band 10,550 to 10,565 MHz for which minimum radiation to suppression to angle (in degrees) from centerline of main beam is 36 decibels.

(5) These antenna standards apply to all point-to-point stations authorized after June 1, 1997. Existing licensees and pending applicants on that date are grandfathered and need not comply with these standards.

(6) These antenna standards apply to all point-to-point stations authorized on or before June 1, 1997.

(7) These antenna standards apply only to DEMS User Stations licensed, in operation, or applied for prior to July 15, 1993.

(8) Except for Multiple Address System frequencies listed in where omnidirectional antennas may be used.

(9) Antennas used at outlying stations as part of a central protection alarm system need conform to only the following 2 standards: (1) The minimum on-beam forward gain must be at least 10 dBi, and (2) the minimum front-to-back ratio must be at least 20 dB.

(10) Except as provided in Section 101.605.

NOTE: Stations must employ an antenna that meets the performance standards for Category A, except that in areas not subject to frequency congestion, antennas meeting standards for Category B may be employed. Note, however, that the Commission may require the use of high performance antennas where interference problems can be resolved by the use of such antennas.

(d) The Commission may require the replacement, prior to activation of the new facilities, at the licensee's expense, of any antenna or periscope antenna system of a permanent fixed station operating at 2500 MHz or higher that does not meet performance Standard A specified in paragraph (c) of this Section, upon a showing that said antenna causes or is likely to cause interference to (or receive interference from) any other authorized or applied for station whereas a higher performance antenna is not likely to involve such interference. Antenna performance is expected to meet the standards of paragraph (c) of this Section for parallel polarization. For cases of potential interference, an antenna will not be considered to meet Standard A unless the parallel polarization performance for the discrimination angle involved meets the requirements, even if the cross-polarization performance controls the interference.

(e) In cases where passive reflectors are employed in conjunction with transmitting antenna systems, the foregoing paragraphs of this section also will be applicable. However, in such instances, the center of the major lobe of radiation from the antenna normally must be directed at the passive reflector, and the center of the major lobe of radiation from the passive reflector directed toward the receiving station with which it communicates.

(f) New periscope antenna systems will be authorized for operation in private operational fixed stations upon a certification that the radiation, in a horizontal plane, from an illuminating antenna and reflector

combination meets or exceeds the antenna standards of this section and, at locations where multiple periscope antennas are employed, that the cross-coupling between periscope antennas is suppressed by an amount equal to or greater than the radiation suppression specified in the standards for angles from the main beam of 140-180° for the particular band and antenna category selected. In no event will periscope antennas be authorized in frequency bands shared with common carriers.

(g) Periscope antennas used at an electric power facility plant area will be excluded from the requirements of paragraphs (c) and (e) of this section on a case-by-case basis where technical considerations preclude the use of other types of antenna systems.

(h) In the event harmful interference is caused to the operation of other stations, the Commission may, after notice and opportunity for hearing, order changes to be made in the height, orientation, gain and radiation pattern of the antenna system.

§ 101.117 Antenna polarization.

Stations operating in the radio services included in this part are not limited as to the type of polarization of the radiated signal, provided, however, that in the event interference in excess of permissible levels is caused to the operation of other stations the Commission may, after notice and opportunity for hearing, order the licensee to change the polarization of the radiated signal. No change in polarization may be made without prior authorization from the Commission.

§ 101.119 Simultaneous use of common antenna structures.

The simultaneous use of common antenna structures by more than one radio station, or by one or more domestic public radio stations and one or more stations of any other class or service, may be authorized: Provided, however, That each licensee or user of any such structure is responsible for maintaining the structure, and for painting and illuminating the structure when obstruction marking is required by the Commission. (See § 101.21(d).)

§ 101.121 Marking of antenna structures.

No permittee or licensee who has been required to paint or light an antenna structure may discontinue the required painting or lighting without having obtained prior written authorization therefor from the Commission. (For complete regulations relative to antenna marking requirements, see Part 17 of this chapter.)

§ 101.123 Quiet zones.

Quiet zones are those areas where it is necessary to restrict radiation so as to minimize possible impact on the operations of radio astronomy or other facilities that are highly sensitive to radio frequency interference.

(a) In order to minimize possible harmful interference at the National Radio Astronomy Observatory site located at Green Bank, Pocohontas County, W. Va., and at the Naval Radio Research Observatory site at Sugar Grove, Pendleton County, W. Va., any applicant for a station authorization other than temporary-fixed seeking a station license for a new station or to modify an existing station in a manner which would change either the frequency, power, antenna height or directivity, or location of such a station within the area boarded by 39°15' N. on the north, 78°30' W. on the east, 37°30' N. on the south, and 80°30' W. on the west must at the time of filing such application with the Commission, simultaneously notify the Director, National Radio Astronomy Observatory, Post Office Box No. 2, Green Bank, W. Va. 24944, in writing, of the technical particulars of the proposed station. Such notification must include the

geographical coordinates of the antenna, antenna height, antenna directivity if any, proposed frequency, type of emission and power. In addition, the applicant must indicate in his application to the Commission the date notification was made to the Observatory. After receipt of such applications, the Commission will allow a period of twenty (20) days for comments or objections in response to the notifications indicated. If an objection to the proposed operation is received during the 20-day period from the National Radio Astronomy Observatory for itself or on behalf of the Naval Radio Research Observatory, the Commission will consider all aspects of the problem and take whatever action is deemed appropriate.

(b) Protection for Table Mountain Radio Receiving Zone, Boulder County, Colorado. Applicants for a station authorization to operate in the vicinity of Boulder County, Colorado under this part are advised to give due consideration, prior to filing applications, to the need to protect the Table Mountain Radio Receiving Zone from harmful interference. These are the research laboratories of the Department of Commerce, Boulder County, Colorado. To prevent degradation of the present ambient radio signal level at the site, the Department of Commerce seeks to ensure that the field strengths of any radiated signals (excluding reflected signals) received on this 1800 acre site (in the vicinity of coordinates 40°07'50" N. Latitude, 105°14'40" W. Longitude), resulting from new assignments or from the modification or relocation of existing facilities do not exceed 1 mV/m in the authorized bandwidth of service. (A field strength of 1 mV/m is equivalent to a power flux density of 85.8 dBW/M^2 assuming a free-space characteristic impedance of 376.7 ohms.)

(1) Advance consultation is recommended particularly for those applicants who have no reliable data which indicates whether the field strength or power flux density figures would be exceeded by their proposed radio facilities. In such instances, the following is a suggested guide for determining whether coordination is recommended:

(i) All stations within 2.4 km (1.5 statute miles);

(ii) Stations within 4.8 km (3 statute miles) with 50 watts or more effective radiated power (ERP) in the primary plane of polarization in the azimuthal direction of the Table Mountain Receiving Zone;

(iii) Stations within 16 km (10 statute miles) with 1 kW or more ERP in the primary plane of polarization in the azimuthal direction of the Table Mountain Receiving Zone;

(iv) Stations within 80 km (50 statute miles) with 25 kW or more ERP in the primary plane of polarization in the azimuthal direction of the Table Mountain Receiving Zone.

(2) Applicants concerned are urged to communicate with the Radio Frequency Management Coordinator, Department of Commerce, Research Support Services, NOAA/R/E5X2, Boulder Laboratories, Boulder CO. 80303; telephone (303) 497-6548, in advance of filing their applications with the Commission.

(3) The Commission will not screen applications to determine whether advance consultation has taken place. However, applicants are advised that such consultation can avoid objections from the Department of Commerce or proceedings to modify any authorization which may be granted which, in fact, delivers a signal at the site in excess of the field strength specified herein.

(c) Applications for authorizations to construct microwave operational-fixed radio stations for transmission of program material to cable television systems will not be accepted, except in the frequency bands above 21,200 MHz.

(d) Protection for Federal Communications Commission monitoring stations:

(1) Applicants in the vicinity of an FCC monitoring station for a radio station authorization to operate new

transmitting facilities or changed transmitting facilities which would increase the field strength produced over the monitoring station over that previously authorized are advised to give consideration, prior to filing applications, to the possible need to protect the FCC stations from harmful interference. Geographical coordinates of the facilities which require protection are listed in § 0.121(c) of the Commission's Rules. Applications for stations (except mobile stations) which will produce on any frequency a direct wave fundamental field strength of greater than 10 mV/m in the authorized bandwidth of service (-65.8 dBW/m^2 power flux density assuming a free space characteristic impedance of 120 ohms) at the referenced coordinates, may be examined to determine extent of possible interference. Depending on the theoretical field strength value and existing root-sum-square or other ambient radio field signal levels at the indicated coordinates, a clause protecting the monitoring station may be added to the station authorization.

(2) In the event that calculated value of expected field exceeds 10 mV/m (-65.8 dBW/m^2) at the reference coordinates, or if there is any question whether field strength levels might exceed the threshold value, advance consultation with the FCC to discuss any protection necessary should be considered. Prospective applicants may communicate with: Chief, Field Operations Bureau, Federal Communications Commission, Washington, D.C. 20554, Telephone (202) 632-6980.

(3) Advance consultation is suggested particularly for those applicants who have no reliable data which indicates whether the field strength or power flux density figure indicated would be exceeded by their proposed radio facilities (except mobile stations). In such instances, the following is a suggested guide for determining whether an applicant should coordinate:

(i) All stations within 2.4 kilometers (1.5 statute miles);

(ii) Stations within 4.8 kilometers (3 statute miles) with 50 watts or more average effective radiated power (ERP) in the primary plane of polarization in the azimuthal direction of the Monitoring Stations.

(iii) Stations within 16 kilometers (10 statute miles) with 1 kW or more average ERP in the primary plane of polarization in the azimuthal direction of the Monitoring Station;

(iv) Stations within 80 kilometers (50 statute miles) with 25 kW or more average ERP in the primary plane of polarization in the azimuthal direction of the Monitoring Station;

(4) Advance coordination for stations operating above 1000 MHz is recommended only where the proposed station is in the vicinity of a monitoring station designated as a satellite monitoring facility in § 0.121(c) of the Commission's rules and also meets the criteria outlined in paragraphs (i) (2) and (3) of this section.

(5) The Commission will not screen applications to determine whether advance consultation has taken place. However, applicants are advised that such consultation can avoid objections from the Federal Communications Commission or modification of any authorization which will cause harmful interference.

§ 101.125 Temporary fixed antenna height restrictions.

The overall antenna structure heights employed by mobile stations in the Local Television Transmission Service and by stations authorized to operate at temporary fixed locations may not exceed the height criteria set forth in Sec. 17.7 of this chapter, unless in each instance, authorization for use of a specific maximum antenna height (above ground and above mean sea level) for each location has been obtained from the Commission prior to erection of the antenna. Requests for such authorization must show the inclusive dates of the proposed operation. (Complete information as to rules concerning the construction, marking and lighting of antenna structures is contained in Part 17 of this chapter.)

§ 101.127 Topographical data.

Determining the location and height above sea level of the antenna site, the elevation or contour intervals must be taken from United States Geological Survey Topographic Quadrangle Maps, United States Army Corps of Engineers maps or Tennessee Valley Authority maps, whichever is the latest, for all areas for which such maps are available. If such maps are not published for the area in question, the next best topographic information should be used. Topographic data may sometimes be obtained from State and municipal agencies. Data from Sectional Aeronautical Charts (including bench marks) or railroad depot elevations and highway elevations from road maps may be used where no better information is available. In cases where limited topographic data is available, use may be made of an altimeter in a car driven along roads extending generally radially from the transmitter site. If it appears necessary, additional data may be requested. United States Geological Survey Topographic Quadrangle Maps may be obtained from the Department of the Interior, Geological Survey, Washington, DC 20242. Sectional Aeronautical Charts are available from the Department of Commerce, Coast and Geodetic Survey, Washington, DC 20230.

§ 101.129 Transmitter location.

(a) The applicant must determine, prior to filing an application for a radio station authorization, that the antenna site specified therein is adequate to render the service proposed. In cases of questionable antenna locations, it is desirable to conduct propagation tests to indicate the field intensity which may be expected in the principal areas or at the fixed points of communication to be served, particularly where severe shadow problems may be expected. In considering applications proposing the use of such locations, the Commission may require site survey tests to be made pursuant to a developmental authorization in the particular service concerned. In such cases, propagation tests should be conducted in accordance with recognized engineering methods and should be made with a transmitting antenna simulating, as near as possible, the proposed antenna installation. Full data obtained from such surveys and its analysis, including a description of the methods used and the name, address and qualifications of the engineer making the survey, must be supplied to the Commission.

(b) Antenna structures should be so located and constructed as to avoid making them hazardous to air navigation. (See Part 17 of this chapter for provisions relating to antenna structures.) Such installation must be maintained in good structural condition together with any required painting or lighting.

§ 101.131 Transmitter construction and installation.

(a) The equipment at the operating and transmitting positions must be so installed and protected that it is not accessible to, or capable of being operated by, persons other than those duly authorized by the licensee.

(b) In any case where the maximum modulating frequency of a transmitter is prescribed by the Commission, the transmitter must be equipped with a low-pass or band-pass modulation filter of suitable performance characteristics. In those cases where a modulation limiter is employed, the modulation filter must be installed between the transmitter stage in which limiting is effected and the modulated stage of the transmitter.

(c) Each transmitter employed in these services must be equipped with an appropriately labeled pilot lamp or meter which will provide continuous visual indication at the transmitter when its control circuits have been placed in a condition to activate the transmitter. In addition, facilities must be provided at each transmitter to permit the transmitter to be turned on and off independently of any remote control circuits associated therewith.

(d) At each transmitter control point the following facilities must be installed:

(1) A carrier operated device which will provide continuous visual indication when the transmitter is radiating, or, in lieu thereof, a pilot lamp or meter which will provide continuous visual indication when the transmitter control circuits have been placed in a condition to activate the transmitter.

(2) Facilities which will permit the operator to turn transmitter carrier on and off at will.

(e) Transmitter control circuits from any control point must be so installed that grounding or shorting any line in the control circuit will not cause the transmitter to radiate: Provided, however, That this provision will not be applicable to control circuits of stations which normally operate with continuous radiation or to control circuits which are under the effective operational control of responsible operating personnel 24 hours per day.

§ 101.133 Limitations on use of transmitters.

(a) Transmitters licensed for operation in Common Carrier services may not be concurrently licensed or used for non-common carrier communication purposes except in the Multipoint Distribution Service (See Part 21 of this Chapter). However, mobile units may be concurrently licensed or used for non-common carrier communication purposes provided that the transmitter is type-accepted for use in each service.

(b) Private operational fixed stations authorized in this service may communicate with associated operational-fixed stations and fixed receivers and with units of associated stations in the mobile service licensed under Private Radio Service rule parts. In addition, intercommunication is permitted with other licensed stations and with U.S. Government stations in those cases which require cooperation or coordination of activities or when cooperative use arrangements in accordance with § 101.135 are contemplated; provided, however, that where communication is desired with stations authorized to operate under the authority of a foreign jurisdiction, prior approval of this Commission must be obtained; And provided further, That the authority under which such other stations operate does not prohibit the intercommunication.

(c) Two or more persons or governmental entities eligible for private operational fixed licenses may use the same transmitting equipment under the following terms and conditions:

(1) Each licensee complies with the general operating requirements set out in this Part.

(2) Each licensee is eligible for the frequency(ies) on which the facility operates.

(3) Each licensee must have the ability to access the transmitter(s) that it is authorized to operate under the multiple licensing arrangement.

§ 101.135 Shared use of radio stations and the offering of private carrier service.

(a) Licensees of Private Operational Fixed radio stations may share the use of their facilities on a non-profit basis or may offer service on a for-profit private carrier basis, subject to the following conditions and limitations:

(1) Persons or governmental entities licensed to operate radio systems on any of the private radio frequencies set out in § 101.101 may share such systems with, or provide private carrier service to, any eligible for licensing under this part, regardless of individual eligibility restrictions, provided that the communications being carried are permissible under § 101.603.

(2) The licensee must maintain access to and control over all facilities authorized under its license.

(3) All sharing and private carrier arrangements must be conducted pursuant to a written agreement to be kept as part of the station records.

(4) The licensee must keep an up-to-date list of system sharers and private carrier subscribers and the basis of their eligibility under this part. Such records must be kept current and must be made available upon request for inspection by the Commission.

§ 101.137 Interconnection of private operational fixed microwave stations.

Private operational fixed stations may be interconnected with facilities of common carriers subject to applicable tariffs.

§ 101.139 Authorization of transmitters.

(a) Except for transmitters used at developmental stations or for fixed point-to-point operation pursuant to Subparts H and I, each transmitter must be a type which has been type accepted by the Commission for use under the applicable rules of this part. Transmitters used in the point-to-point microwave service under Subparts H and I for fixed operation must be of a type that has been either notified or type accepted by the Commission (see Sec. 2.904(d) of this chapter). Effective March 5, 1984, only grants of notification will be issued for transmitters used exclusively for fixed point-to-point operation. Transmitters designed for use in the 31.0 to 31.3 GHz band will be authorized under the notification procedure.

(b) Any manufacturer of a transmitter to be produced for use under the rules of this part may request type acceptance or notification by following the applicable procedures set forth in Part 2 of this chapter. Type accepted and notified transmitters are included in the Commission's Radio Equipment List. Copies of this list are available for inspection at the Commission's office in Washington, D.C. and at each of its field offices.

(c) Type acceptance or notification for an individual transmitter may also be requested by an applicant for a station authorization, pursuant to the procedures set forth in Part 2 of this chapter. An individual transmitter will not normally be included in the Radio Equipment List but will be enumerated on the station authorization.

(d) A transmitter presently shown on an instrument of authorization, which operates on an assigned frequency in the 890-940 MHz band and has not been type accepted, may continue to be used by the licensee without type acceptance provided such transmitter continues otherwise to comply with the applicable rules and regulations of the Commission.

(e) Type acceptance or notification is not required for portable transmitters operating with peak output power not greater than 250 mW. If operation of such equipment causes harmful interference the FCC may, at its discretion, require the licensee to take such corrective action as is necessary to eliminate the interference.

(f) After July 15, 1996, the manufacture (except for export) or importation of equipment employing digital modulation techniques in the 3700-4200, 5925-6425, 6525-6875, 10,550-10,680 and 10,700-11,700 MHz bands must meet the minimum payload capacity requirements of § 101.139.

§ 101.141 Microwave digital modulation.

(a) Microwave transmitters employing digital modulation techniques and operating below 15 GHz must, with appropriate multiplex equipment, comply with the following additional requirements:

(1) The bit rate, in bits per second, must be equal to or greater than the bandwidth specified by the emission designator in Hertz (e.g., to be acceptable, equipment transmitting at a 20 Mb/s rate must not require a bandwidth of greater than 20 MHz), except the bandwidth used to calculate the minimum rate may not include any authorized guard band.

(2) Equipment to be used for voice transmission placed in service, authorized, or applied for on or before June 1, 1997 in the 2110 to 2130 and 2160 to 2180 MHz bands must be capable of satisfactory operation within the authorized bandwidth to encode at least 96 voice channels. Equipment placed in service, authorized, or applied for on or before June 1, 1997 in the 3700-4200, 5925-6425 (30 MHz bandwidth), and 10,700-11,700 MHz (30 and 40 MHz bandwidths) bands must be capable of satisfactory operation within the authorized bandwidth to encode at least 1152 voice channels. These required loading levels may be reduced by a factor of 1/N provided that N transmitters may be operated satisfactorily, over the same radio path, within an authorized bandwidth less than, or equal to, the maximum authorizable bandwidth (e.g., the 1152 channel requirement may be reduced to 576 if two transmitters can be satisfactorily operated over the same path within the maximum bandwidth). Where type accepted equipment is designed to operate on the same frequency in a cross polarized configuration to meet the above capacity requirements, the Commission will require, at the time additional transmitters are authorized, that both polarizations of a frequency be used before a new frequency assignment is made, unless a single transmitter installation was found to be justified by the Commission at the time it authorized the first transmitter.

(3) The following capacity and loading requirements must be met for equipment applied for, authorized, and placed in service after June 1, 1997 in the 3700-4200 MHz (4 GHz), 5925-6425 and 6525-6875 MHz (6 GHz), 10,550-10,680 MHz (10 GHz), and 10,700-11,700 MHz (11 GHz) bands:

Nominal Channel Bandwidth (MHz)	Minimum Payload Capacity (Mbits/s)	Minimum Traffic Loading Payload (as percent of payload capacity)	Typical Utilization*
0.400	1.54	n/a	1 DS-1
0.800	3.08	n/a	2 DS-1
1.25	3.08	n/a	2 DS-1
1.60	6.17	n/a	4 DS-1
2.50	6.17	n/a	4 DS-1
3.75	12.3	n/a	8 DS-1
5.0	18.5	n/a	12 DS-1
10.0	44.7	50**	1 DS-3/STS-1
20.0	89.4	50**	2 DS-3/STS-1
30.0 (11 GHz)	89.4	50**	2 DS-3/STS-1
30.0 (6 GHz)	134.1	50**	3 DS-3/STS-1
40.0	134.1	50**	3 DS-3/STS-1

* DS and STS refer to the number of voice circuits a channel can accommodate. 1 DS-1 = 24 voice circuits; 2 DS-1 = 48; 4 DS-1 = 96; 8 DS-1 = 192; 12 DS-1 = 288; 1 DS-3/STS-1 = 672; 2 DS-3/STS-1 = 1344; 3 DS-3/STS-1 = 2016.
** This loading requirement must be met within 30 months of licensing. If two transmitters simultaneously operate on the same frequency over the same path, the requirement is reduced to 25 percent.

(4) If a transmitter is authorized to operate in a bandwidth that is not listed in paragraph (a)(3) of this section, it must meet the minimum payload capacity and traffic loading requirements of the next largest channel bandwidth listed in the table; e.g., if the authorized bandwidth is 3.5 MHz, the minimum payload capacity must be 12.3 Mbits/s.

(5) Transmitters carrying digital motion video motion material are exempt from the requirements

specified in paragraphs (a)(2) and (a)(3) of this section, provided that at least 50 percent of the payload is digital video motion material and the minimum bit rate specified in paragraph (a)(1) is met. In the 6, 10, and 11 GHz bands, concatenation of multiple contiguous channels is permitted for channels of equal bandwidth on center frequencies, provided no other channels are available and the minimum payload capacity requirements are met.

(b) For purposes of compliance with the emission limitation requirements of § 101.111(a)(2) of this part and the requirements of paragraph (a) of this section, digital modulation techniques are considered as being employed when digital modulation occupies 50 percent or more to the total peak frequency deviation of a transmitted radio frequency carrier. The total peak frequency deviation will be determined by adding the deviation produced by the digital modulation signal and the deviation produced by any frequency division multiplex (FDM) modulation used. The deviation (D) produced by the FDM signal must be determined in accordance with § 2.202(f) of Part 2 of this chapter.

(c) Transmitters employing digital modulation techniques must effectively eliminate carrier spikes or single frequency tones in the output signal to the degree which would be obtained without repetitive patterns occurring in the signal.

(d) Transmitters type accepted for use with digital modulation prior to November 1, 1974 may continue to be used where authorized until December 31, 1976. After the latter date, such equipment will no longer be type accepted for digital modulation unless it is type accepted for such use after November 1, 1974.

(e) Microwave transmitters employing digital modulation techniques in the bands 17,700-19,700 MHz must transmit at bit rate, in bits per second (bps), equal to or greater than the authorized bandwidth in Hertz (e.g., to be acceptable, equipment transmitting at a 20 Mbps rate must not require an authorized bandwidth greater than 20 MHz). This bps/Hz standard is independent of the antenna (polarization) used, frequency reuse, or how the system is configured.

NOTE: Until December 1, 1988, no minimum bit rate will apply to the 17,700-19,700 MHz band. Systems authorized prior to that date may install equipment after that date with no minimum bit rate.

§ 101.143 Minimum path lengths for fixed lengths.

(a) The distance between end points of a fixed link in the private operational fixed service and the point-to-point service must equal or exceed the value set forth in the table below or the EIRP must be reduced in accordance with the equation set forth below.

Frequency Band (MHz)	Minimum path length (km)
Below 1,850	n/a
1,850 to 7,125	17
10,550 to 13,250	5
Above 17,700	n/a

(b) For paths shorter than those specified in the Table, the EIRP may not exceed the value derived from the following equation.

EIRP = 30 - 20 log[A/B], dBW

Where:

EIRP = Equivalent isotropic radiated power in dBW.
A = Minimum path length from the Table for the frequency band in kilometers.
B= The actual path length in kilometers.

NOTE: Automatic transmit power control may be used to meet this requirement up to a 3 dB increase in EIRP.

(c) Upon an appropriate technical showing, applicants and licensees unable to meet the minimum path length requirement may be granted an exception to these requirements.

§ 101.145 Interference to geostationary-satellites.

These limitations are necessary to minimize the probability of harmful interference to reception in the bands 2655-2690 MHz, 5925-6875 MHz, and 12.7-12.75 GHz on board geostationary-space stations in the fixed-satellite service (Part 25).

(a) Stations authorized prior to July 1, 1976 in the band 2655-2690 MHz, which exceed the power levels in paragraphs (a) and (b) of this section are permitted to operate indefinitely, provided that the operations of such stations does not result in harmful interference to reception in these band on board geostationary space stations.

(b) 2655 to 2690 MHz and 5925 to 6875 MHz. No directional transmitting antenna utilized by a fixed station operating in these bands may be aimed within 2 degrees of the geostationary-satellite orbit, taking into account atmospheric refraction. However, exception may be made in unusual circumstances upon a showing that there is no reasonable alternative to the transmission path proposed. If there is no evidence that such exception would cause possible harmful interference to an authorized satellite system, said transmission path may be authorized on waiver basis where the maximum value of the equivalent isotropically radiated power (EIRP) does not exceed:

(1) +47 dBW for any antenna beam directed within 0.5 degrees of the stationary satellite orbit or

(2) +47 to +55 dBW, on a linear decibel scale (8 dB per degree) for any antenna beam directed between 0.5 degrees and 1.5 degrees of the stationary orbit.

(c) 12.7 to 12.75 GHz. No directional transmitting antenna utilized by a fixed station operating in this band may be aimed within 1.5 degrees of the geostationary-satellite orbit, taking into account atmospheric refraction. However, exception may be made in unusual circumstances upon a showing that there is no reasonable alternative to the transmission path proposed. If there is no evidence that such exception would cause possible harmful interference to an authorized satellite system, said transmission path may be authorized on waiver basis where the maximum value of the equivalent isotropically radiated power (EIRP) does not exceed +45 dBW for any antenna beam directed within 1.5 degrees of the stationary satellite orbit.

(d) Methods for calculating the azimuths to be avoided may be found in: CCIR Report No. 393 (Green Books), New Delhi, 1970; in "Radio-Relay Antenna Pointing for controlled Interference With Geostationary-Satellites" by C. W. Lundgren and A. S. May, Bell System Technical Journal, Vol. 48, No. 10, pp. 3387-3422, December 1969; and in "Geostationary Orbit Avoidance Computer Program" by Richard G. Gould, Common Carrier Bureau Report CC-7201, FCC, Washington, DC, 1972. This latter report is available through the National Technical Information Service, U.S. Department of Commerce, Springfield, VA 22151, in printed form (PB-211 500) or source card deck (PB-211 501).

Subpart D - Operational Requirements

§ 101.201 Station inspection.

The licensee of each station authorized in the radio services included in this part must make the station available for inspection by representatives of the Commission at any reasonable hour.

§ 101.203 Communications concerning safety of life and property.

(a) Handling and transmission of messages concerning the safety of life or property which is in imminent danger must be afforded priority over other messages.

(b) No person may knowingly cause to be transmitted any false or fraudulent message concerning the safety of life or property, or refuse upon demand immediately to relinquish the use of a radio circuit to enable the transmission of messages concerning the safety of life or property which is in imminent danger, or knowingly interfere or otherwise obstruct the transmission of such messages.

§ 101.205 Operation during emergency.

The licensee of any station in these services may, during a period of emergency in which normal communication facilities are disrupted as a result of hurricane, flood, earthquake, or similar disaster, utilize such station for emergency communication service in a manner other than that specified in the instrument of authorization: Provided, (a) That as soon as possible after the beginning of such emergency use, notice be sent to the Commission at Washington, D.C. stating the nature of the emergency and the use to which the station is being put, and (b) that the emergency use of the station must be discontinued as soon as substantially normal communication facilities are again available, and (c) that the Commission at Washington, D.C. must be notified immediately when such special use of the station is terminated, and (d) that, in no event, will any station engage in emergency transmission on frequencies other than, or with power in excess of, that specified in the instrument of authorization or as otherwise expressly provided by the Commission, or by law, and (e) that the Commission may, at any time, order the discontinuance of any such emergency communication.

§ 101.207 Suspension of transmission.

Transmission must be suspended immediately upon detection by the station or operator licensee or upon notification by the Commission of a deviation from the technical requirements of the station authorization and must remain suspended until such deviation is corrected, except for transmission concerning the immediate safety of life or property, in which case transmission must be suspended immediately after the emergency is terminated.

§ 101.209 Operation of stations at temporary fixed locations for communication between the United States and Canada or Mexico.

Stations authorized to operate at temporary fixed locations may not be used for transmissions between the United States and Canada, or the United States and Mexico, without prior specific notification to, and authorization from, the Commission. Notification of such intended usage of the facilities should include a detailed showing of the operation proposed, including the parties involved, the nature of the communications to be handled, the terms and conditions of such operations, the time and place of operation, such other matters as the applicant deems relevant, and a showing as to how the public interest, convenience and necessity would be served by the proposed operation. Such notification should

be given sufficiently in advance of the proposed date of operation to permit any appropriate correlation with the respective foreign government involved (see §§ 101.717, 101.811, 101.813, and 101.815).

§ 101.211 Operator requirements for Private Operational Fixed Stations.

(a) No operator license is required for the operation, maintenance, or repair of stations licensed under this part.

(b) An unlicensed person, with the consent or authorization of the licensee, may employ stations in this service for the purpose of telecommunications in accordance with the conditions and limitations set forth in § 101.135 of this part.

(c) The station licensee is responsible for the proper operation of the station at all times and is expected to provide for observations, servicing and maintenance as often as may be necessary to ensure proper operation. All adjustments or tests during or coincident with the installation, servicing, or maintenance of the station should be performed by or under the immediate supervision and responsibility of a person technically qualified to perform transmitter installation, operation, maintenance, and repair duties in the private land mobile services and fixed services by an organization or committee representative of users in those services.

(d) The provisions of paragraph (b) of this section authorizing unlicensed persons to operate stations may not be construed to change or diminish in any respect the responsibility of station licensees to have and to maintain control over the stations licensed to them (including all transmitter units thereof), or for the proper functioning and operation of those stations (including all transmitter units thereof) in accordance with the terms of the licenses of those stations.

§ 101.213 Station identification.

Stations in the private service are exempt from the requirement to identify transmissions by call sign or any other station identifier.

Subpart E - Miscellaneous Common Carrier Provisions

§ 101.301 National defense; free service.

Any common carrier authorized under the rules of this part may render to any agency of the United States Government free service in connection with the preparation for the national defense. Every such carrier rendering any such free service must make and file, in duplicate, with the Commission, on or before the 31st of July and on or before the 31st day of January in each year, reports covering the periods of 6 months ending on the 30th of June and the 31st of December, respectively, next prior to said dates. These reports must show the names of the agencies to which free service was rendered pursuant to this rule, the general character of the communications handled for each agency, and the charges in dollars which would have accrued to the carrier for such service rendered to each agency if charges for such communications had been collected at the published tariff rates.

§ 101.303 Answers to notices of violation.

Any person receiving official notice of a violation of the terms of the Communications Act of 1934, as amended, any other Federal statute or Executive Order pertaining to radio or wire communications or any international radio or wire communications treaty or convention, or regulations annexed thereto to which the United States is a party, or the rules and regulations of the Federal Communications Commission, must, within 10 days from such receipt, send a written answer to the office of the Commission originating the official notice. If an answer cannot be sent or an acknowledgment made within such 10-day period by reason of illness or other unavoidable circumstances, acknowledgment and answer must be made at the earliest practicable date with a satisfactory explanation of the delay. The answer to each notice must be complete in itself and may not be abbreviated by reference to other communications or answers to other notices. If the notice relates to some violation that may be due to the physical or electrical characteristics of transmitting apparatus, the answer must state fully what steps have been taken to prevent future violations, and, if any new apparatus is to be installed, the date such apparatus was ordered, the name of the manufacturer, and promised date of delivery. If the installation of such apparatus requires a construction permit, the file number of the application must be given or, if a file number has not been assigned by the Commission, such identification as will permit ready reference thereto. If the notice of violation relates to inadequate maintenance resulting in improper operation of the transmitter, the name and license number of the operator performing the maintenance must be given. If the notice of violation relates to some lack of attention to, or improper operation of, the transmitter by other employees, the reply must enumerate the steps taken to prevent a recurrence of such lack of attention or improper operation.

§ 101.305 Discontinuance, reduction or impairment of service.

(a) If the public communication service provided by a station in the Common Carrier Radio Services is involuntarily discontinued, reduced or impaired for a period exceeding 48 hours, the station licensee must promptly notify the Commission, in writing, at Federal Communications Commission, Common Carrier Radio Services, 1270 Fairfield Road, Gettysburg, Pennsylvania 17325. In every such case, the licensee must furnish full particulars as to the reasons for such discontinuance, reduction or impairment of service, including a statement as to when normal service is expected to be resumed. When normal service is resumed, prompt notification thereof must be given in writing to the Federal Communications Commission, Common Carrier Radio Services, 1270 Fairfield Road, Gettysburg, Pennsylvania 17325.

(b) No station licensee subject to title II of the Communications Act of 1934, as amended, may voluntarily discontinue, reduce or impair public communication service to a community or part of a community without obtaining prior authorization from the Commission pursuant to the procedures set forth in part 63 of this chapter. In the event that permanent discontinuance of service is authorized by the Commission, the station licensee must promptly send the station license to the Federal Communications Commission,

Common Carrier Radio Services, 1270 Fairfield Road, Gettysburg, Pennsylvania 17325 for cancellation.

(c) Any common carrier station licensee, not subject to title II of the Communications Act of 1934, as amended, who voluntarily discontinues, reduces or impairs public communication service to a community or a part of a community must give written notification to the Commission within 7 days thereof. In the event of permanent discontinuance of service, the station licensee must promptly send the station license to the Federal Communications Commission, Common Carrier Radio Services, 1270 Fairfield Road, Gettysburg, Pennsylvania 17325 for cancellation.

(d) If any common carrier radio frequency should not be used to render any service as authorized during a consecutive period of twelve months at any time after construction is completed and a certification of completion of construction has been filed, under circumstances that do not fall within the provisions of paragraph (a), (b) or (c) of this section, or, if removal of equipment or facilities has rendered the station not operational, the licensee must, within thirty days of the end of such period of nonuse:

(1) Submit for cancellation the station license (or licenses) to the Federal Communications Commission, Common Carrier Radio Services, 1270 Fairfield Road, Gettysburg, Pennsylvania 17325 for cancellation.

(2) File an application for modification of the license (or licenses) to delete the unused frequency (or frequencies); or

(3) Request waiver of this rule and demonstrate either that the frequency will be used (as evidenced by appropriate requests for service, etc.) within six months of the end of the initial period of nonuse, or that the frequency will be converted to allow rendition of other authorized public services within one year of the end of the initial period of nonuse by the filing of appropriate applications within six months of the end of the period of nonuse.

§ 101.307 Tariffs, reports, and other material required to be submitted to the Commission.

Sections 1.771 through 1.815 of this chapter contain summaries of certain materials and reports, including schedule of charges and accounting and financial reports, which, when applicable, must be filed with the Commission.

§ 101.309 Requirement that licensees respond to official communications.

All licensees in these services are required to respond to official communications from the Commission with reasonable dispatch and according to the tenor of such communications. Failure to do so will be given appropriate consideration in connection with any subsequent applications which the offending party may file and may result in the designation of such applications for hearing, or in appropriate cases, the institution of proceedings looking to the modification or revocation of the pertinent authorizations.

§ 101.311 Equal employment opportunities.

Equal opportunities in employment must be afforded by all common carrier licensees in accordance with the provisions of § 21.307 of this Chapter.

Subpart F–Developmental Authorizations

§ 101.401 Eligibility.

Developmental authorizations for stations in the radio services included in this part will be issued only to existing and proposed licensees who are legally, financially and otherwise qualified to conduct experimentation for the development of engineering or operational data, or techniques, directly related to a proposed radio service or to a regularly established radio service regulated by the rules of this part.

§ 101.403 Scope of service.

Developmental authorizations may be issued for:

(a) Field strength surveys relative to or precedent to the filing of applications for licenses, in connection with the selection of suitable locations for stations proposed to be established in any of the regularly established radio services regulated by the rules of this part; or

(b) The testing of existing or authorized antennas, wave guides, or transmission paths.

§ 101.405 Adherence to program of research and development.

The program of research and development, as stated by an applicant in the application for license or stated in the instrument of station authorization, must be substantially adhered to unless the licensee is otherwise authorized by the Commission.

§ 101.407 Special procedure for the development of a new service or for the use of frequencies not in accordance with the provisions of the rules in this part.

(a) An authorization for the development of a new service not in accordance with the provisions of the rules in this part may be granted for a limited time, but only after the Commission has made a preliminary determination with respect to the factors set forth in this paragraph, as each case may require. This procedure also applies to any application that involves use of a frequency which is not in accordance with the provisions of the rules in this part, although in accordance with the Table of Frequency Allocations contained in Part 2 of this chapter. (An application which involves use of a frequency which is not in accordance with the Table of Frequency Allocations in Part 2 of this chapter should be filed in accordance with the provisions of Part 5 of this chapter, Experimental Radio Services.) The factors with respect to which the Commission will make a preliminary determination before acting on an application filed under this paragraph are as follows:

(1) That the public interest, convenience or necessity warrants consideration of the establishment of the proposed service or the use of the proposed frequency;

(2) That the proposed operation appears to warrant consideration to effect a change in the provisions of the rules in this part; and/or

(3) That some operational data should be developed for consideration in any rule making proceeding which may be initiated.

(b) Applications for stations that are intended to be used in the development of a proposed service must be accompanied by a petition to amend the Commission's rules with respect to frequencies and such other items as may be necessary to provide for the regular establishment of the proposed service.

§ 101.409 Terms of grant; general limitations.

(a) Developmental authorizations normally will be issued for one year, or such shorter term as the Commission may deem appropriate in any particular case, and will be subject to cancellation without hearing by the Commission at any time upon notice to the licensee.

(b) Where some phases of the developmental program are not covered by the general rules of the Commission or by the rules of this part, the Commission may specify supplemental or additional requirements or conditions in each case as it may deem necessary in the public interest, convenience or necessity.

(c) Frequencies allocated to the service toward which such development is directed will be assigned for developmental operation on the basis that no interference will be caused to the regular services of stations operating in accordance with the Commission's Table of Frequency Allocations (Sec. 2.106 of this chapter).

(d) The rendition of communication service for hire is not permitted under any developmental authorizations unless specifically authorized by the Commission.

(e) The grant of a developmental authorization carries with it no assurance that the developmental program, if successful, will be authorized on a permanent basis either as to the service involved or the use of the frequencies assigned or any other frequencies.

§ 101.411 Supplementary showing required.

(a) Authorizations for development of a proposed radio service in the services included in this part will be issued only upon a showing that the applicant has a definite program of research and development, the details of which must be set forth, which has reasonable promise of substantial contribution to these services within the term of such authorization. A specific showing should be made as to the factors which qualify the applicant technically to conduct the research and development program, including a description of the nature and extent of engineering facilities that the applicant has available for such purposes.

(b) Expiring developmental authorizations may be renewed only upon the applicant's compliance with the applicable requirements of § 101.413(a) and (b) relative to the authorization sought to be renewed and upon a factual showing that further progress in the program of research and development requires further radio transmission and that the public interest, convenience or necessity would be served by renewal of such authorization.

§ 101.413 Developmental report required.

(a) Upon completion of the program of research and development, or, in any event, upon the expiration of the instrument of station authorization under which such investigations were permitted, or at such times during the term of the station authorization as the Commission may deem necessary to evaluate the progress of the developmental program, the licensee must submit, in duplicate, a comprehensive report on the following items, in the order designated:

(1) Report on the various phases of the project which were investigated.

(2) Total number of hours of operation on each frequency assigned.

(3) Copies of any publication on the project.

(4) Detailed analysis of the result obtained.

(5) Any other pertinent information.

(b) In addition to the information required by paragraph (a) of this section, the developmental report of a station authorized for the development of a proposed radio service must include comprehensive information on the following items:

(1) Probable public support and methods of its determination.

(2) Practicability of service operations.

(3) Interference encountered.

(4) Pertinent information relative to merits of the proposed service.

(5) Propagation characteristics of frequencies used, particularly with respect to the service objective.

(6) Frequencies believed to be more suitable and reasons therefor.

(7) Type of signals or communications employed in the experimental work.

(c) Developmental reports will be made a part of the Commission's public records, except upon the applicant's specific request for confidentiality and Commission approval in accordance with Section 0.459 of this Chapter. Information determined confidential by the Commission will not be publicly disclosed.

Subpart G - Digital Electronic Message Service

§ 101.501 Eligibility.

Applications will be granted only in cases in which the applicant establishes it is legally, technically, financially and otherwise qualified to render the services proposed and that the public interest, convenience and necessity would be served by such a grant. Each application will identify the Standard Metropolitan Statistical Area (SMSA) within which boundaries the Digital Electronic Message Service (DEMS) nodal station will be constructed and which the facility will serve.

§ 101.503 Digital Electronic Message Service Nodal Stations.

DEMS Nodal Stations may be authorized only as a part of an integrated communication system wherein DEMS User Stations associated therewith also are licensed to the DEMS Nodal Station licensee. Applications for DEMS Nodal Station licenses should specify the maximum number of DEMS User Stations to be served by that nodal station. Any increase in that number must be applied for pursuant to § 101.15.

§ 101.505 Frequencies.

(a) Frequencies in the 17,700-19,700 MHz band are available for assignment for all DEMS applicants. Assignment will consist of a pair of channels as set out in paragraph (c) of this section plus internodal channels as set out in paragraph (d) of this section.

(b) Licensees may apply for an additional channel pair in an SMSA only when it is operating its previously authorized DEMS at or near the expected capacity and the service to be provided will fully utilize all spectrum requested.

(c) DEMS assignments will be made according to the following plan, except that systems licensed, in operation, or applied for in the 10,565-10,615 and 10,630-10,680 MHz bands prior to July 15, 1993 are permitted to use frequencies in those bands if they prior coordinate with 10 GHz point-to-point licensees:

Channel No.	Nodal station frequency band (MHz)	User station frequency band (MHz)
30	18,870-18,880	19,210-19,220
31	18,880-18,890	19,220-19,230
32	18,890-18,900	19,230-19,240
33	18,900-18,910	19,240-19,250
34	18,910-18,920	19,250-19,260

These channel pairs will be assigned in each SMSA and may be subdivided as desired by the licensee.

(d) Internodal link assignments are to be made in accordance with the provisions of Subpart I, applying to point-to-point operations.

§ 101.507 Frequency stability

The frequency stability of each DEMS Nodal Station transmitter authorized for this service in the 17,700-

19,700 MHz band must be ±0.001%. The frequency stability of each DEMS User Station transmitter authorized for this service in this band must be ±0.003%.

§ 101.509 Interference protection criteria.

(a) All harmful interference to other users and blocking of adjacent channel use in the same city and cochannel use in nearby Standard Metropolitan Statistical Areas is prohibited. In areas where SMSA's are in close proximity, careful consideration should be given to minimum power requirements and to the location, height, and radiation pattern of the transmitting antenna. Licensees and applicants are expected to cooperate fully in attempting to resolve problems of potential interference before bringing the matter to the attention of the Commission.

(b) As a condition for use of frequencies in this service each carrier is required to:

(1) Engineer the system to be reasonably compatible with adjacent channel operations in the same city; and

(2) Cooperate fully and in good faith to resolve whatever potential interference and transmission security problems may be present in adjacent channel operation.

(c) The following interference studies, as appropriate, must be included with each application for a new or major modification in a DEMS Nodal Station:

(1) An analysis of the potential for harmful interference with other stations if the coordinates of any proposed station are located within 80 kilometers (50 miles) of the coordinates of any authorized, or previously proposed station(s) that utilizes, or would utilize, the same frequency or an adjacent potentially interfering frequency; and

(2) An analysis concerning possible adverse impact upon Canadian communications if the station's transmitting antenna is to be located within 55 kilometers (35 miles) of the Canadian border.

(d) In addition a copy of the interference analysis submitted in response to paragraph (c)(1) of this section must be served on all applicants and/or grantees concerned within 5 days of its submission to the Commission.

§ 101.511 Purpose and permissible service.

(a) The DEMS is intended to provide for the exchange of digital information among and between subscribers using one or more DEMS Systems.

(b) Unless otherwise directed or conditioned in the applicable instrument of authorization, DEMS may be used to exchange any type of digital information consistent with the Commission's Rules and the applicable tariff of the carrier.

(c) The carrier's tariff must fully describe the parameters of the service to be provided, including the degree of communications security a subscriber can expect in ordinary service.

§ 101.513 Transmitter power.

The transmitter power will be governed by § 101.113 of this rule part. Further, each application must contain an analysis demonstrating compliance with § 101.113(a).

§ 101.515 Emissions and bandwidth.

Different types of emissions may be authorized if the applicant describes fully the modulation and bandwidth desired, and demonstrates that the bandwidth desired is no wider than needed to provide the intended service. In no event, however, may the necessary or occupied bandwidth exceed the specified channel width of the assigned pair.

§ 101.517 Antennas.

(a) Transmitting antennas may be omnidirectional or directional, consistent with coverage and interference requirements.

(b) The use of horizontal or vertical plane wave polarization, or right hand or left hand rotating elliptical polarization must be used to minimize harmful interference between stations.

(c) Directive antennas must be used at all DEMS User Stations and may be elevated no higher than necessary to assure adequate service. User antenna heights may not exceed the height criteria of Part 17 of this chapter, unless authorization for use of a specific maximum antenna height (above ground and above sea level) for each location has been obtained from the Commission prior to the erection of the antenna. Requests for such authorization must show the inclusive dates of the proposed operation. (See Part 17 of this chapter concerning the construction, marking and lighting of antenna structures).

§ 101.519 Interconnection.

(a) All DEMS licensees must make available to the public all information necessary to allow the manufacture of user equipment that will be compatible with the licensee's network.

(b) All DEMS licensees must make available to the public all information necessary to allow interconnection of DEMS networks.

§ 101.521 Spectrum utilization.

All applicants for DEMS frequencies must submit as part of the original application a detailed plan indicating how the bandwidth requested will be utilized. In particular the application must contain detailed descriptions of the modulation method, the channel time sharing method, any error detecting and/or correcting codes, any spatial frequency reuse system and the total data throughput capacity in each of the links in the system. Further, the application must include a separate analysis of the spectral efficiency including both information bits per unit bandwidth and the total bits per unit bandwidth.

Subpart H - Private Operational Fixed Microwave Service

§ 101.601 Eligibility

Any person, or any governmental entity or agency, eligible for licensing in a radio service under Parts 80, 87, or 90 or any person proposing to provide communications service to such persons, governmental entities or agencies is eligible to hold a license under this Subpart.

§ 101.603 Permissible Communications.

(a) Except as provided in paragraph (b) of this section, stations in this radio service may transmit communications as follows:

(1) On frequencies below 21,200 MHz, licensees may transmit their own communications, including the transmission of their products and information services, to their customers except that the distribution of video entertainment material to customers is permitted only as indicated in and subparagraph (a)(2) of this section.

(2) In the frequency bands 6425-6525 MHz, 18,142-18,580 MHz and on frequencies above 21,200 MHz, licensees may deliver any of their own products and services to any receiving location;

(3) Licensees may transmit the communications of their parent corporation, or of another subsidiary of the same parent, or their own subsidiary where the party to be served is regularly engaged in any of the activities that constitute the basis for eligibility to use the frequencies assigned;

(4) Licensees may transmit the communications of other parties in accordance with § 101.135;

(5) Licensees may transmit emergency communications unrelated to their activities in accordance with § 101.205;

(6) Licensees may transmit communications on a commercial basis to eligible users, among different premises of a single eligible user, or from one eligible user to another as part of transmissions by Digital Electronic Message Service systems on the frequencies provided for this purpose;

(7) Licensees may transmit program material from one location to another, provided that the frequencies do not serve as the final RF link in the chain of distribution of the program material to broadcast stations;

(b) Stations licensed in this radio service shall not:

(1) Render a common carrier communications service of any kind.

(2) Transmit program material for use in connection with broadcasting, except as provided in paragraphs (a)(2), and (a)(7)) of this section.

(3) Be used to provide the final RF link in the chain of transmission of program material to cable television systems, multipoint distribution systems or master antenna TV systems, except in the frequency bands 6425-6525 and 18,142-18,580 MHz and on frequencies above 21,200 MHz.

§ 101.605 Frequencies.

Frequencies normally available for assignment in this service are set forth with applicable limitations in

the following tables:

(a) 928-960 MHz. Multiple address system (MAS) frequencies are available for the point-to-multipoint transmission of a licensee's products or services, excluding video entertainment material, to a licensee's customer or for its own internal communications. The paired frequencies listed in this section are used for two-way interrogate/ response communications between a master station and remote stations. Each master station operating on these frequencies is required to serve a minimum of four separate active remote stations. Ancillary one-way communications on paired frequencies are permitted on a case-by-case basis. Ancillary communications between interrelated master stations are permitted on a secondary basis. The normal channel bandwidth assigned will be 12.5 kHz. Upon adequate justification, however, channels with bandwidths up to 50 kHz may be authorized. Tables 2, 4, and 6 list frequencies with 25 kHz bandwidth channels. When licensed for a larger bandwidth, the system still is required to use equipment that meets the +/-0.00015 percent tolerance requirement. (See § 101.107). Systems licensed for frequencies in these MAS bands prior to August 1, 1975, may continue to operate as authorized until June 11, 1996, at which time they must comply with current MAS operations based on the 12.5 kHz channelization set forth in this paragraph. Systems licensed between August 1, 1975, and January 1, 1981, inclusive, are required to comply with the grandfathered 25 kHz standard bandwidth and channelization requirements set forth in this paragraph. Systems originally licensed after January 1, 1981, and on or before May 11, 1988, with bandwidths of 25 kHz and above, will be grandfathered indefinitely.

(1) General Access Pool: Frequencies listed in this paragraph are available to all persons eligible under this Part for use in multiple address radio systems. Except as noted, however, the frequencies may be used by eligibles in the Power Radio Service only if the frequencies in paragraph (a)(2) of this Section are exhausted in the particular geographic area. The frequencies are also available for shared use by Part 22 Public Land Mobile Service users if frequencies listed in Sec. 22.501(g) of this chapter are exhausted in the particular geographic area. Applications for use of these frequencies under Part 22 are subject to Part 101 requirements.

Table 1--Paired Frequencies (MHz)

(12.5 kHz bandwidth)

Remote transmit	Master transmit
928.00625	952.00625
928.01875	952.01875
928.03125	952.03125
928.04375	952.04375
928.05625	952.05625
928.06875	952.06875
928.08125	952.08125
928.09375	952.09375
928.10625	952.10625
928.11875	952.11875
928.13125	952.13125
928.14375	952.14375
928.15625	952.15625
928.16875	952.16875
928.18125	952.18125
928.19375	952.19375
928.20625	952.20625

928.21875	952.21875
928.23125	952.23125
928.24375	952.24375
928.25625	952.25625
928.26875	952.26875
928.28125	952.28125
928.29375	952.29375
928.30625	952.30625
928.31875	952.31875
928.33125	952.33125
928.34375	952.34375

Unpaired Frequencies (MHz)/1/

(12.5 kHz bandwidth)

956.25625	956.33125	956.39375
956.26875	956.34375	956.40625
956.28125	956.35625	956.41875
956.29375	956.36875	956.43125
956.30625	956.38125	956.44375
956.31875		

/1/ Available to power eligibles regardless of whether frequencies in the power pool are exhausted.

Table 2--Paired Frequencies (MHz)

(25 kHz bandwidth)

Remote transmit	Master transmit
928.0125	952.0125
928.0375	952.0375
928.0625	952.0625
928.0875	952.0875
928.1125	952.1125
928.1375	952.1375
928.1625	952.1625
928.1875	952.1875
928.2125	952.2125
928.2375	952.2375
928.2625	952.2625
928.2875	952.2875
928.3125	952.3125
928.3375	952.3375

Unpaired frequencies (MHz)/1/

(25 kHz bandwidth)

956.2625	956.3375	956.4125
956.2875	956.3625	956.4375
956.3125	956.3875	

/1/Available to power eligibles regardless of whether frequencies in the power pool are exhausted.

(2) Power Pool: Frequencies listed in this paragraph are available to persons eligible under Sec. 90.63 of this chapter for licensing in the Power Radio Service for use in multiple address radio systems. After January 1, 1992, the frequencies are also available for use by general access pool users and Part 22 Public Land Mobile Service users (Sec. 22.501(g) of this chapter) provided frequencies listed in their respective pools are exhausted in the particular geographic area. Applications for use of these frequencies under Part 22 of this chapter are subject to Part 101 of this chapter requirements.

Table 3--Paired Frequencies (MHz)

(12.5 kHz bandwidth)

Remote transmit	Master transmit
928.35625	952.35625
928.36875	952.36875
928.38125	952.38125
928.39375	952.39375
928.40625	952.40625
928.41875	952.41875
928.43125	952.43125
928.44375	952.44375
928.45625	952.45625
928.46875	952.46875
928.48125	952.48125
928.49375	952.49375
928.50625	952.50625
928.51875	952.51875
928.53125	952.53125
928.54375	952.54375
928.55625	952.55625
928.56875	952.56875
928.58125	952.58125
928.59375	952.59375
928.60625	952.60625
928.61875	952.61875
928.63125	952.63125
928.64375	952.64375
928.65625	952.65625
928.66875	952.66875

928.68125	952.68125
928.69375	952.69375
928.70625	952.70625
928.71875	952.71875
928.73125	952.73125
928.74375	952.74375
928.75625	952.75625
928.76875	952.76875
928.78125	952.78125
928.79375	952.79375
928.80625	952.80625
928.81875	952.81875
928.83125	952.83125
928.84375	952.84375

Table 4--Paired Frequencies (MHz)

(25 kHz bandwidth)

Remote transmit	Master transmit
928.3625	952.3625
928.3875	952.3875
928.4125	952.4125
928.4375	952.4375
928.4625	952.4625
928.4875	952.4875
928.5125	952.5125
928.5375	952.5375
928.5625	952.5625
928.5875	952.5875
928.6125	952.6125
928.6375	952.6375
928.6625	952.6625
928.6875	952.6875
928.7125	952.7125
928.7375	952.7375
928.7625	952.7625
928.7875	952.7875
928.8125	952.8125
928.8375	952.8375

(3) Frequencies listed in this paragraph are available for shared use by general access pool users for multiple address operations if frequencies listed in paragraph (a)(1) of this section are exhausted in the particular geographic area: The frequencies are also available to eligibles in the power pool provided there are no other frequencies available for the type of operation contemplated. The frequencies in this pool may be assigned for paired or unpaired operation. If paired, the corresponding lower frequency is for remote unit use. Applications for these frequencies are subject to the conditions outlined in Sec. 22.27 of this chapter.

Table 5–Public Mobile Service Category Frequencies (MHz)

(12.5 kHz bandwidth)

Remote transmit	Master transmit
928.85625	959.85625
928.86875	959.86875
928.88125	959.88125
928.89375	959.89375
928.90625	959.90625
928.91875	959.91875
928.93125	959.93125
928.94375	959.94375
928.95625	959.95625
928.96875	959.96875
928.98125	959.98125
928.99375	959.99375

Table 6–Public Mobile Service Category Frequencies (MHz)

(25 kHz bandwidth)

Remote transmit	Master transmit
928.8625	959.8625
928.8875	959.8875
928.9125	959.9125
928.9375	959.9375
928.9625	959.9625
928.9875	959.9875

(4) Frequencies listed in this paragraph are shared with stations in the Public Land Mobile Service (Part 22).

Table 7–Paired Frequencies

(12.5 kHz bandwidth)

Remote transmit	Master transmit
932.00625	941.00625
932.01875	941.01875
932.03125	941.03125
932.04375	941.04375
932.05625	941.05625
932.06875	941.06875
932.08125	941.08125

932.09375	941.09375
932.10625	941.10625
932.11875	941.11875
932.13125	941.13125
932.14375	941.14375
932.15625	941.15625
932.16875	941.16875
932.18125	941.18125
932.19375	941.19375
932.20625	941.20625
932.21875	941.21875
932.23125	941.23125
932.24375	941.24375
932.25625	941.25625
932.26875	941.26875
932.28125	941.28125
932.29375	941.29375
932.30625	941.30625
932.31875	941.31875
932.33125	941.33125
932.34375	941.34375
932.35625	941.35625
932.36875	941.36875
932.38125	941.38125
932.39375	941.39375
932.40625	941.40625
932.41875	941.41875
932.43125	941.43125
932.44375	941.44375
932.45625	941.45625
932.46875	941.46875
932.48125	941.48125
932.49375	941.49375

(5) Equivalent power and antenna heights for multiple address master stations:

Antenna height (AAT) in meters(feet)	Maximum effective radiated power	
	Watts	dBm
Above 305 (1,000)	200	53
Above 274 (900) to 305 (1,000)	250	54
Above 244 (800) to 274 (900)	315	55
Above 213 (700) to 244 (800)	400	56
Above 182 (600) to 213 (700)	500	57
Above 152.5 (500) to 182 (600)	630	58
152.5 (500) and below	1,000	60

For mobile operations the maximum ERP is 25 watts (44 dBm)

(6) Fixed point-to-point frequencies.

Table 8--Paired Frequencies

(25 kHz bandwidth)

Transmit (or receive)	Receive (or transmit)
932.5125	941.5125
932.5375	941.5375
932.5625	941.5625
932.5875	941.5875
932.6125	941.6125
932.6375	941.6375
932.6625	941.6625
934.8375	943.8375
934.8625	943.8625
934.8875	943.8875
934.9125	943.9125
934.9375	943.9375
934.9625	943.9625
934.9875	943.9875

Table 9--Paired Frequencies

(50 kHz bandwidth)

Transmit (receive) (MHz)	Receive (transmit) (MHz)
932.70	941.70
932.75	941.75
934.80	943.80
956.65	953.05
956.75	953.15
956.85	953.25
956.95	953.35
957.05	953.45
957.25	953.65
957.35	953.75
957.45	953.85
957.65	954.05
957.75	954.15
957.85	954.25
958.05	954.45
958.15	954.55
958.25	954.65
958.45	954.85
958.55	954.95

958.65	955.05
958.85	955.25
958.95	955.35
959.05	955.45
959.25	955.65
959.35	955.75
959.45	955.85
959.55	955.95
959.65	956.05

Table 10–Paired Frequencies

(100 kHz bandwidth)

Transmit (receive) (MHz)	Receive (transmit) (MHz)
932.8250	941.8250
932.9250	941.9250
933.0250	942.0250
934.5250	943.5250
934.6250	943.6250
934.725	943.7250
956.6	953.0
956.7	953.1
956.8	953.2
956.9	953.3
957.0	953.4
957.1	953.5
957.2	953.6
957.3	953.7
957.4	953.8
957.5	953.9
957.6	954.0
957.7	954.1
957.8	954.2
957.9	954.3
958.0	954.4
958.1	954.5
958.2	954.6
958.3	954.7
958.4	954.8
958.5	954.9
958.6	955.0
958.7	955.1
958.8	955.2
958.9	955.3
[illegible]0	955.4
[illegible]1	955.5
[illegible].2	955.6

959.3	955.7
959.4	955.8
959.5	955.9
959.6	956.0
959.7	956.1

Table 11--Paired Frequencies

(200 kHz bandwidth)

Transmit (receive) (MHz)	Receive (transmit) (MHz)
933.1750	942.1750
933.3750	942.3750
933.5750	942.5750
933.7750	942.7750
933.9750	942.9750
934.1750	943.1750
934.3750	943.3750
957.15	953.55
957.55	953.95
957.95	954.35
958.35	954.75
958.75	955.15
959.15	955.55

(b) 1850-1990 MHz.

(1) 10 MHz maximum bandwidth.

Paired Frequencies

Transmit (or receive)	Receive (or transmit)
1855	1935
1865	1945
1875	1955
1885	1965
1895	1975
1905	1985

Unpaired Frequencies

/1/ 1915
/1/ 1925

/1/ Available for systems employing one-way transmission.

(2) 5 MHz maximum bandwidth.

Paired Frequencies

Transmit (or receive)	Receive (or transmit)
1860	1940
1870	1950
1880	1960
1890	1970
1900	1980

(c) 2130-2150 MHz; 2180-2200 MHz; 800 kHz maximum bandwidth, unless noted.

Paired Frequencies

2130-2150 MHz Transmit (or receive)	2180-2200 MHz Receive (or transmit)
2130.8	2180.8
2131.6	2181.6 /1/
2132.4	2182.4
2133.2	2183.2 /1/
2134.0	2184.0
2134.8	2184.8 /1/
2135.6	2185.6
2136.4	2186.4 /1/
2137.2	2187.2
2138.0	2188.0 /1/
2138.8	2188.8
2139.6	2189.6 /1/
2140.4	2190.4
2141.2	2191.2 /1/
2142.0	2192.0
2142.8	2192.8 /1/
2143.6	2193.6
2144.4	2194.4 /1/
2145.2	2195.2
2146.0	2196.0 /1/
2146.8	2196.8
2147.6	2197.6 /1/
2148.4	2198.4
2149.2	2199.2

/1/ Consideration will be given on a case-by-case basis to assigning these frequency pairs to systems

employing 1600 kHz bandwidth transmissions.

(d) 2150-2160 MHz: Specific frequency of operation to be set forth in authorization. Omnidirectional transmission only may be authorized, subject to providing protection from harmful interference to previously authorized stations in this service and in other services sharing this band.

(e) 2450-2500 MHz:

(1) This band is shared with other communications services and is not subject to protection from interference from industrial, scientific, and medical devices operating on 2450 MHz.

(2) Stations licensed in this band under this part prior to (effective date of rules) are grandfathered and may continue their authorized operations. Stations licensed in the 2483.5-2500 MHz portion of the band as of July 25, 1985, or on a subsequent date as a result of submitting an application on or before July 25, 1985, are grandfathered, and may continue operations, subject only to license renewal, on a co-primary basis with the Radiodetermination Satellite Service.

(3) 625 KHz bandwidth channels. The normal bandwidth authorized will be 625 kHz. Upon adequate justification, additional contiguous channels may be authorized to provide up to a 2500 kHz bandwidth.

Paired Frequencies (MHZ)

Transmit (or receive)	Receive (or transmit)
2450.3125	2467.5625
2450.9375	2468.1875
2451.5625	2468.8125
2452.1875	2469.4375
2452.8125	2470.0625
2453.4375	2470.6875
2454.0625	2471.3125
2454.6875	2471.9375
2455.3125	2472.5625
2455.9375	2473.1875
2456.5625	2473.8125
2457.1875	2474.4375
2457.8125	2475.0625
2458.4375	2475.6875
2459.0625	2476.3125
2459.6875	2476.9375
2460.3125	2477.5625
2460.9375	2478.1875
2461.5625	2478.8125
2462.1875	2479.4375
2462.8125	2480.0625
2463.4375	2480.6875
2464.0625	2481.3125
2464.6875	2481.9375
2465.3125	2482.5625

2465.9375 . . . . . 2483.1875

The 2466.25-2467.25 MHz portion of this band is an unchanneled band between paired transmit and receive frequencies. Use of frequencies in this band with up to 1 MHz authorized bandwidth will be considered on a case-by-case basis and will be subject to the technical standards for the 2450-2500 MHz band as outlined in this part. Authorization will be made on a secondary basis only.

(f) 2500-2690 MHz: Operational-fixed stations may be authorized on the following frequencies:

Frequencies (MHz)

2686.9375
2687.9375
2688.5625
2688.6875
2688.9375
2689.5625
2689.6875

Operational-Fixed stations authorized in this band as of July 16, 1971, which do not comply with the provisions of this part may continue to operate on the frequencies assigned on a coequal basis with other stations operating in accordance with the Table of Frequency allocations. Requests for subsequent license renewals or modifications for such stations will be considered. However, expansion of systems comprised of such stations will not be permitted, except pursuant to the provisions of this part. No new licenses will be issued under this part until specific operating parameters are established for this band.

(g) 3,700 to 4,200 MHz. 20 MHz maximum authorized bandwidth. 20 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
3710	3750
3730	3770
3790	3830
3810	3850
3870	3910
3890	3930
3950	3990
3970	4010
4030	4070
4050	4090
4110	4150
4130	4170
n/a	4190 /1/

/1/ This frequency may be assigned for unpaired use.

(h) 5,925 to 6,425 MHz. 30 MHz authorized bandwidth.

(1) 400 kHz bandwidth channels:

Transmit (receive) (MHz)		Receive (transmit) (MHz)
5925.225	.....	6177.100
5925.625	.....	6177.500
5926.050	.....	6177.925
5926.450	.....	6178.325
5926.875	.....	6178.750
5927.275	.....	6179.150
5927.725	.....	6179.600
5928.125	.....	6180.000
5928.550	.....	6180.425
5928.950	.....	6180.825
5929.375	.....	6181.250
5929.775	.....	6181.650
6168.350	.....	6420.225
6168.750	.....	6420.625
6169.175	.....	6421.050
6169.575	.....	6421.450
6170.000	.....	6421.875
6170.400	.....	6422.275
6170.850	.....	6422.725
6171.250	.....	6423.125
6171.675	.....	6423.550
6172.075	.....	6423.950
6172.500	.....	6424.375
6172.900	.....	6424.775

(2) 800 kHz bandwidth channels:

Transmit (receive) (MHz)		Receive (transmit) (MHz)
5925.425	.....	6177.300
5926.250	.....	6178.125
5927.075	.....	6178.950
5927.925	.....	6179.800
5928.750	.....	6180.625
5929.575	.....	6181.450
6168.550	.....	6420.425
6169.375	.....	6421.250
6170.200	.....	6422.075
6171.050	.....	6422.925
6171.875	.....	6423.750
6172.700	.....	6424.575

(3) 1.25 MHz bandwidth channels:

Transmit	Receive

(receive) (MHz)		(transmit) (MHz)
5925.625	.....	6177.500
5926.875	.....	6178.750
5928.125	.....	6180.000
5929.375	.....	6181.250
6108.893	.....	6360.933
6110.128	.....	6362.168
6111.364	.....	6363.404
6112.599	.....	6364.639
6113.834	.....	6365.874
6115.070	.....	6367.110
6116.305	.....	6368.345
6117.541	.....	6369.581
6118.776	.....	6370.816
6120.011	.....	6372.051
6121.247	.....	6373.287
6122.482	.....	6374.522
6123.718	.....	6375.758
6124.953	.....	6376.993
6126.189	.....	6378.229
6127.424	.....	6379.464
6128.659	.....	6380.699
6129.895	.....	6381.935
6131.130	.....	6383.170
6132.366	.....	6384.406
6133.601	.....	6385.641
6134.836	.....	6386.876
6136.072	.....	6388.112
6137.307	.....	6389.347
6138.543	.....	6390.583
6139.778	.....	6391.818
6141.041	.....	6393.054
6142.249	.....	6394.289
6143.484	.....	6395.524
6144.720	.....	6396.760
6145.955	.....	6397.995
6147.191	.....	6399.231
6148.426	.....	6400.466
6149.661	.....	6401.701
6150.897	.....	6402.937
6152.132	.....	6404.172
6153.368	.....	6405.408
6154.603	.....	6406.643
6155.839	.....	6407.879
6157.074	.....	6409.114
6158.309	.....	6410.349
6159.545	.....	6411.585
6160.780	.....	6412.820
6162.016	.....	6414.056
6163.251	.....	6415.291

6164.486	.....	6416.526
6165.722	.....	6417.762
6166.957	.....	6418.997
6168.750	.....	6420.625
6170.000	.....	6421.875
6171.250	.....	6423.125
6172.500	.....	6424.375
6173.750 /1/	.....	n/a
6175.000 /1/	.....	n/a
6176.250 /1/	.....	n/a

/1/ These frequencies may be assigned for unpaired use.

(4) 2.5 MHz bandwidth channels:

Transmit (receive) (MHz)		Receive (transmit) (MHz)
5926.250	.....	6178.125
5928.750	.....	6180.625
6109.510	.....	6361.550
6111.981	.....	6364.021
6114.452	.....	6366.492
6116.923	.....	6368.963
6119.394	.....	6371.434
6121.865	.....	6373.905
6124.335	.....	6376.375
6126.806	.....	6378.846
6129.277	.....	6381.317
6131.748	.....	6383.788
6134.219	.....	6386.259
6136.690	.....	6388.730
6139.160	.....	6391.200
6141.631	.....	6393.671
6144.102	.....	6396.142
6146.573	.....	6398.613
6149.044	.....	6401.084
6151.515	.....	6403.555
6153.985	.....	6406.025
6156.456	.....	6408.496
6158.927	.....	6410.967
6161.398	.....	6413.438
6163.869	.....	6415.909
6166.340	.....	6418.380
6169.375	.....	6421.250
6171.875	.....	6423.750
6175.625 /1/	.....	n/a

/1/ This frequency may be assigned for unpaired use.

(5) 3.75 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
6111.364	6363.404
6116.305	6368.345
6121.247	6373.287
6126.189	6378.229
6131.130	6383.170
6136.072	6388.112
6141.014	6393.054
6145.955	6397.995
6150.897	6402.937
6155.839	6407.879
6160.780	6412.820
6165.722	6417.762
6175.000 /1/	n/a

/1/ This frequency may be assigned for unpaired use.

(6) 5 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
6110.75	6362.79
6115.69	6367.73
6120.63	6372.67
6125.57	6377.61
6130.51	6382.55
6135.45	6387.49
6140.40	6392.44
6145.34	6397.38
6150.28	6402.32
6155.22	6407.26
6160.16	6412.20
6165.10	6417.14

(7) 10 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
5935.32	6187.36
5945.20	6197.24
5955.08	6207.12
5964.97	6217.01
5974.85	6226.89
5984.73	6236.77

5994.62	.....	6246.66
6004.50	.....	6256.54
6014.38	.....	6266.42
6024.27	.....	6276.31
6034.15	.....	6286.19
6044.03	.....	6296.07
6053.92	.....	6305.96
6063.80	.....	6315.84
6073.68	.....	6325.72
6083.57	.....	6335.61
6093.45	.....	6345.49
6103.33	.....	6355.37
6113.22 /1/	.....	6365.26 /1/
6123.10 /1/	.....	6375.14 /1/
6132.98 /1/	.....	6385.02 /1/
6142.87 /1/	.....	6394.91 /1/
6152.75 /1/	.....	6404.79 /1/
6162.63 /1/	.....	6414.67 /1/

/1/ Alternate channels. These channels are set aside for narrow bandwidth systems and should be used only if all other channels are blocked.

(8) 30 MHz bandwidth channels:

Transmit (receive) (MHz)		Receive (transmit) (MHz)
5945.20	.....	6197.24
5974.85	.....	6226.89
6004.50	.....	6256.54
6034.15	.....	6286.19
6063.80	.....	6315.84
6093.45	.....	6345.49
6123.10 /1/	.....	6375.14 /1/
6152.75 /1/	.....	6404.79 /1/

/1/ Alternate channels. These channels are set aside for narrow bandwidth systems and should be used only if all other channels are blocked.

(i) 6,525 to 6,875 MHz. 10 MHz authorized bandwidth.

(1) 400 kHz bandwidth channels:

Transmit (receive) (MHz)		Receive (transmit) (MHz)
6525.225	.....	6870.225
6525.625	.....	6870.625
6526.050	.....	6871.050
6526.450	.....	6871.450

6526.875	6871.875
6527.275	6872.275
6527.725	6872.725
6528.125	6873.125
6528.550	6873.550
6528.950	6873.950
6529.375	6874.375
6529.775	6874.775

(2) 800 kHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
6525.425	6870.425
6526.250	6871.250
6527.075	6872.075
6527.925	6872.925
6528.750	6873.750
6529.575	6874.575

(3) 1.25 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
6525.625	6870.625
6526.875	6871.875
6528.125	6873.125
6529.375	6874.375
6540.625 /1/	6718.125 /1/
6541.875 /1/	6719.375 /1/
6543.126 /1/	6713.125 /1/
6544.375 /1/	6714.375 /1/
6545.625 /1/	6715.625 /1/
6546.875 /1/	6716.875 /1/
6548.125	6728.125
6549.375	6729.375
6550.625	6730.625
6551.875	6731.875
6553.125 /1/	6723.125 /1/
6554.375 /1/	6724.375 /1/
6555.625 /1/	6725.625 /1/
6556.875 /1/	6726.875 /1/
6558.125	6738.125
6559.375	6739.375
6560.625	6740.625
6561.875	6741.875
6563.125	6733.125
6564.375	6734.375

6565.625 ..... 6735.625
6566.875 ..... 6736.875
6568.125 /1/ ..... 6720.625 /1/
6569.375 /1/ ..... 6721.875 /1/
6580.625 /1/ ..... 6868.125 /1/
6581.875 /1/ ..... 6869.375 /1/
6583.125 ..... 6743.125
6584.375 ..... 6744.375
6585.625 ..... 6745.625
6586.875 ..... 6746.875
6588.125 ..... 6748.125
6589.375 ..... 6749.375
6590.625 ..... 6750.625
6591.875 ..... 6751.875
6593.125 ..... 6753.125
6594.375 ..... 6754.375
6595.625 ..... 6755.625
6596.875 ..... 6756.875
6598.125 ..... 6758.125
6599.375 ..... 6759.375
6600.625 ..... 6760.625
6601.875 ..... 6761.875
6603.125 ..... 6763.125
6604.375 ..... 6764.375
6605.625 ..... 6765.625
6606.875 ..... 6766.875
6608.125 ..... 6768.125
6609.375 ..... 6769.375
6610.625 ..... 6770.625
6611.875 ..... 6771.875
6713.125 ..... 6773.125
6614.375 ..... 6774.375
6615.625 ..... 6775.625
6616.875 ..... 6776.875
6618.125 ..... 6778.125
6619.375 ..... 6779.375
6620.625 ..... 6780.625
6621.875 ..... 6781.875
6623.125 ..... 6783.125
6624.375 ..... 6784.375
6625.625 ..... 6785.625
6626.875 ..... 6786.875
6628.125 ..... 6788.125
6629.375 ..... 6789.375
6630.625 ..... 6790.625
6631.875 ..... 6791.875
6633.125 ..... 6793.125
6634.375 ..... 6794.375
6635.625 ..... 6795.625
6636.875 ..... 6796.875
6638.125 ..... 6798.125
6639.375 ..... 6799.375

6640.625 ..... 6800.625
6641.875 ..... 6801.875
6643.125 ..... 6803.125
6644.375 ..... 6804.375
6645.625 ..... 6805.625
6646.875 ..... 6806.875
6648.125 ..... 6808.125
6649.375 ..... 6809.375
6650.625 ..... 6810.625
6651.875 ..... 6811.875
6653.125 ..... 6813.125
6654.375 ..... 6814.375
6655.625 ..... 6815.625
6656.875 ..... 6816.875
6658.125 ..... 6818.125
6659.375 ..... 6819.375
6660.625 ..... 6820.625
6661.875 ..... 6821.875
6663.125 ..... 6823.125
6664.375 ..... 6824.375
6665.625 ..... 6825.625
6666.875 ..... 6826.875
6668.125 ..... 6828.125
6669.375 ..... 6829.375
6670.625 ..... 6830.625
6671.875 ..... 6831.875
6673.125 ..... 6833.125
6674.375 ..... 6834.375
6675.625 ..... 6835.625
6676.875 ..... 6836.875
6678.125 ..... 6838.125
6679.375 ..... 6839.375
6680.625 ..... 6840.625
6681.875 ..... 6841.875
6683.125 ..... 6843.125
6684.375 ..... 6844.375
6685.625 ..... 6845.625
6686.875 ..... 6846.875
6688.125 ..... 6848.125
6689.375 ..... 6849.375
6690.625 ..... 6850.625
6691.875 ..... 6851.875
6693.125 ..... 6853.125
6694.375 ..... 6854.375
6695.625 ..... 6855.625
6696.875 ..... 6856.875
6698.125 ..... 6858.125
6699.375 ..... 6859.375
6700.625 ..... 6860.625
6701.875 ..... 6861.875
6703.125 ..... 6863.125
6704.375 ..... 6864.375

6705.625	6865.625
6706.875	6866.875
6708.125 /1/	6710.625 /1/
6709.375 /1/	6711.875 /1/

/1/ These frequencies may be assigned for unpaired use.

(4) 2.5 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
6526.25	6871.25
6528.75	6873.75
6541.25 /1/	6718.75 /1/
6543.75 /1/	6713.75 /1/
6546.25 /1/	6716.25 /1/
6548.75	6728.75
6551.25	6731.25
6553.75 /1/	6723.75 /1/
6556.25 /1/	6726.25 /1/
6558.75	6738.75
6561.25	6741.25
6563.75	6733.75
6566.25	6736.25
6568.75 /1/	6721.25 /1/
6581.25 /1/	6868.75 /1/
6583.75	6743.75
6586.25	6746.25
6588.75	6748.75
6591.25	6751.25
6593.75	6753.75
6596.25	6756.25
6598.75	6758.75
6601.25	6761.25
6603.75	6763.75
6606.25	6766.25
6608.75	6768.75
6611.25	6771.25
6613.75	6773.75
6616.25	6776.25
6618.75	6778.75
6621.25	6781.25
6623.75	6783.75
6626.25	6786.25
6628.75	6788.75
6631.25	6791.25
6633.75	6793.75
6636.25	6796.25
6638.75	6798.75
6641.25	6801.25

6643.75	6803.75
6646.25	6806.25
6648.75	6808.75
6651.25	6811.25
6653.75	6813.75
6656.25	6816.25
6658.75	6818.75
6661.25	6821.25
6663.75	6823.75
6666.25	6826.25
6668.75	6828.75
6671.25	6831.25
6673.75	6833.75
6676.25	6836.25
6678.75	6838.75
6681.25	6841.25
6683.75	6843.75
6686.25	6846.25
6688.75	6848.75
6691.25	6851.25
6693.75	6853.75
6696.25	6856.25
6698.75	6858.75
6701.25	6861.25
6703.75	6863.75
6706.25	6866.25
6708.75 /1/	6711.25 /1/

/1/ These frequencies may be assigned for unpaired use.

(5) 3.75 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
6545.625 /1/	6715.625 /1/
6550.625	6730.625
6555.625 /1/	6725.625 /1/
6560.625	6740.625
6565.625	6735.625
6585.625	6745.625
6590.625	6750.625
6595.625	6755.625
6600.625	6760.625
6605.625	6765.625
6610.625	6770.625
6615.625	6775.625
6620.625	6780.625
6625.625	6785.625
6630.625	6790.625
6635.625	6795.625

6640.625	6800.625
6645.625	6805.625
6650.625	6810.625
6655.625	6815.625
6660.625	6820.625
6665.625	6825.625
6670.625	6830.625
6675.625	6835.625
6680.625	6840.625
6685.625	6845.625
6690.625	6850.625
6695.625	6855.625
6700.625	6860.625
6705.625	6865.625
6710.625 /1/	6720.625 /1/

/1/ These frequencies may be assigned for unpaired use.

(6) 5 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
6545 /1/	6715 /1/
6550	6730
6555 /1/	6725 /1
6560	6740
6565	6735
6585	6745
6590	6750
6595	6755
6600	6760
6605	6765
6610	6770
6615	6775
6620	6780
6625	6785
6630	6790
6635	6795
6640	6800
6645	6805
6650	6810
6655	6815
6660	6820
6665	6825
6670	6830
6675	6835
6680	6840
6685	6845
6690	6850
6695	6855

6700	6860
6705	6865
6710 /1/	6720 /1/

/1/ These frequencies may be assigned for unpaired use.

(7) 10 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
6545 /1/	6715 /1/
6555 /1/	6725 /1/
6565	6735
6585	6745
6595	6755
6605	6765
6615	6775
6625	6785
6635	6795
6645	6805
6655	6815
6665	6825
6675	6835
6685	6845
6695	6855
6705	6865
6535 /2/	6575 /2/

/1/ These frequencies may be assigned or unpaired use.

/2/ Available only for emergency restoration, maintenance bypass, or other temporary-fixed purposes. Such uses are authorized on a non-interference basis to other frequencies in this band. Interference analysis required by § 101.105 does not apply to this frequency pair.

(j) 10,550 to 10,680 MHz. 5 MHz authorized bandwidth.

(1) 400 kHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
10605.225	10670.225
10605.625	10670.625
10606.050	10671.050
10606.450	10671.450
10606.875	10671.875
10607.275	10672.275

10607.725	.....	10672.725
10608.125	.....	10673.125
10608.550	.....	10673.550
10608.950	.....	10673.950
10609.375	.....	10674.375
10609.775	.....	10674.775
10610.225	.....	10675.225
10610.625	.....	10675.625
10611.050	.....	10676.050
10611.450	.....	10676.450
10611.875	.....	10676.875
10612.275	.....	10677.275
10612.725	.....	10677.725
10613.125	.....	10678.125
10613.550	.....	10678.550
10613.950	.....	10678.950
10614.375	.....	10679.375
10614.775	.....	10679.775

(2) 800 kHz bandwidth channels:

Transmit (receive) (MHz)		Receive (transmit) (MHz)
10605.425	.....	10670.425
10606.250	.....	10671.250
10607.075	.....	10672.075
10607.925	.....	10672.925
10608.750	.....	10673.750
10609.575	.....	10674.575
10610.425	.....	10675.425
10611.250	.....	10676.250
10612.075	.....	10677.075
10612.925	.....	10677.925
10613.750	.....	10678.750
10614.575	.....	10679.575

(3) 1.25 MHz bandwidth channels:

Transmit (receive) (MHz)		Receive (transmit) (MHz)
10550.625	.....	10615.625
10551.875	.....	10616.875
10553.125	.....	10618.125
10554.375	.....	10619.375
10555.625	.....	10620.625
10556.875	.....	10621.875
10558.125	.....	10623.125
10559.375	.....	10624.375

10560.625	.....	10625.625
10561.875	.....	10626.875
10563.125	.....	10628.125
10564.375	.....	10629.375
10565.625	.....	10630.625
10566.875	.....	10631.875
10568.125	.....	10633.125
10569.375	.....	10634.375
10570.625	.....	10635.625
10571.875	.....	10636.875
10573.125	.....	10638.125
10574.375	.....	10639.375
10575.625	.....	10640.625
10576.875	.....	10641.875
10578.125	.....	10643.125
10579.375	.....	10644.375
10580.625	.....	10645.625
10581.875	.....	10646.875
10583.125	.....	10648.125
10584.375	.....	10649.375
10585.625	.....	10650.625
10586.875	.....	10651.875
10588.125	.....	10653.125
10589.375	.....	10654.375
10590.625	.....	10655.625
10591.875	.....	10656.875
10593.125	.....	10658.125
10594.375	.....	10659.375
10595.625	.....	10660.625
10596.875	.....	10661.875
10598.125	.....	10663.125
10599.375	.....	10664.375
10600.625	.....	10665.625
10601.875	.....	10666.875
10603.125	.....	10668.125
10604.375	.....	10669.375
10605.625	.....	10670.625
10606.875	.....	10671.875
10608.125	.....	10673.125
10609.375	.....	10674.375
10610.625	.....	10675.625
10611.875	.....	10676.875
10613.125	.....	10678.125
10614.375	.....	10679.375

(4) 2.5 MHz bandwidth channels:

Transmit (receive) (MHz)		Receive (transmit) (MHz)
10551.25	.....	10661.25

10553.75	10618.75
10556.25	10621.25
10558.75	10623.75
10561.25	10626.25
10563.75	10628.75
10566.25	10631.25
10568.75	10633.75
10571.25	10636.25
10573.75	10638.75
10576.25	10641.25
10578.75	10643.75
10581.25 /1/	10646.25 /1/
10583.75 /1/	10648.75 /1/
10586.25 /1/	10651.25 /1/
10588.75 /1/	10653.75 /1/
10591.25 /1/	10656.25 /1/
10593.75 /1/	10658.75 /1/
10596.25 /1/	10661.25 /1/
10598.75 /1/	10663.75 /1/
10601.25	10666.25
10603.75	10668.75
10606.25 /1/	10671.25
10608.75	10673.75
10611.25 /1/	10676.25
10613.75	10678.75

/1/ These frequencies are also available for DEMS licensed, in operation, or applied for prior to July 15, 1993.

(5) 3.75 MHz bandwidth channels:

Transmit (receive) (MHz)		Receive (transmit) (MHz)
10553.125	.....	10618.125
10558.125	.....	10623.125
10563.125	.....	10628.125
10568.125	.....	10633.125
10573.125	.....	10638.125
10578.125	.....	10643.125
10583.125	.....	10648.125
10588.125	.....	10653.125
10593.125	.....	10658.125
10598.125	.....	10663.125
10603.125	.....	10668.125

(6) 5 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)

10552.5	.....	10617.5
10557.5	.....	10622.5
10562.5	.....	10627.5
10567.5	.....	10632.5
10572.5	.....	10637.5
10577.5	.....	10642.5
10582.5	.....	10647.5
10587.5	.....	10652.5
10592.5	.....	10657.5
10597.5	.....	10662.5
10602.5	.....	10667.5

(k) 10,700 to 11,700 MHz. 40 MHz authorized bandwidth.

(1) 1.25 MHz bandwidth channels:

Transmit (receive) (MHz)		Receive (transmit) (MHz)
11130.625	.....	11620.625
11131.875	.....	11621.875
11133.125	.....	11623.125
11134.375	.....	11624.375
11135.625	.....	11625.625
11136.875	.....	11626.875
11138.125	.....	11628.125
11139.375	.....	11629.375
11140.625	.....	11630.625
11141.875	.....	11631.875
11143.125	.....	11633.125
11144.375	.....	11634.375
11145.625	.....	11635.625
11146.875	.....	11636.875
11148.125	.....	11638.125
11149.375	.....	11639.375
11150.625	.....	11640.625
11151.875	.....	11641.875
11153.125	.....	11643.125
11154.375	.....	11644.375
11155.625	.....	11645.625
11156.875	.....	11646.875
11158.125	.....	11648.125
11159.375	.....	11649.375
11160.625	.....	11650.625
11161.875	.....	11651.875
11163.125	.....	11653.125
11164.375	.....	11654.375
11165.625	.....	11655.625
11166.875	.....	11656.875
11168.125	.....	11658.125

11169.375	.....	11659.375
11170.625	.....	11660.625
11171.875	.....	11661.875
11173.125	.....	11663.125
11174.375	.....	11664.375
11175.625	.....	11665.625
11176.875	.....	11666.875
11178.125	.....	11668.125
11179.375	.....	11669.375
11180.625	.....	11680.625
11181.875	.....	11681.875
11183.125	.....	11683.125
11184.375	.....	11684.375
11185.625	.....	11685.625
11186.875	.....	11686.875
11188.125	.....	11688.125
11189.375	.....	11689.375
11190.625	.....	11690.625
11191.875	.....	11691.875
11193.125	.....	11693.125
11194.375	.....	11694.375
11195.625	.....	11695.625
11196.875	.....	11696.875
11198.125	.....	11698.125
11199.375	.....	11699.375

(2) 2.5 MHz bandwidth channels:

Transmit (receive) (MHz)		Receive (transmit) (MHz)
11131.25	.....	11621.25
11133.75	.....	11623.75
11136.25	.....	11626.25
11138.75	.....	11628.75
11141.25	.....	11631.25
11143.75	.....	11633.75
11146.25	.....	11636.25
11148.75	.....	11638.75
11151.25	.....	11641.25
11153.75	.....	11643.75
11156.25	.....	11646.25
11158.75	.....	11648.75
11161.25	.....	11651.25
11163.75	.....	11653.75
11166.25	.....	11656.25
11168.75	.....	11658.75
11171.25	.....	11661.25
11173.75	.....	11663.75
11176.25	.....	11666.25
11178.75	.....	11668.75

11181.25	.....	11681.25
11183.75	.....	11683.75
11186.25	.....	11686.25
11188.75	.....	11688.75
11191.25	.....	11691.25
11193.75	.....	11693.75
11196.25	.....	11696.25
11198.75	.....	11698.75

(3) 3.75 MHz bandwidth channels:

Transmit (receive) (MHz)		Receive (transmit) (MHz)
11133.125	.....	11623.125
11138.125	.....	11628.125
11143.125	.....	11633.125
11148.125	.....	11638.125
11153.125	.....	11643.125
11158.125	.....	11648.125
11163.125	.....	11653.125
11168.125	.....	11658.125
11173.125	.....	11663.125
11178.125	.....	11668.125
11183.125	.....	11683.125
11188.125	.....	11688.125
11193.125	.....	11693.125
11198.125	.....	11698.125

(4) 5 MHz bandwidth channels:

Transmit (receive) (MHz)		Receive (transmit) (MHz)
11132.5	.....	11622.5
11137.5	.....	11627.5
11142.5	.....	11632.5
11147.5	.....	11637.5
11152.5	.....	11642.5
11157.5	.....	11647.5
11162.5	.....	11652.5
11167.5	.....	11657.5
11172.5	.....	11662.5
11177.5	.....	11667.5
11182.5	.....	11682.5
11187.5	.....	11687.5
11192.5	.....	11692.5
11197.5	.....	11697.5

(5) 10 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
10705	11205
10715	11215
10725 /2/	11675 /1/
10735	11225
10745	11235
10755	11245
10765	11255
10775	11265
10785	11275
10795	11285
10805	11295
10815	11305
10825	11315
10835	11325
10845	11335
10855	11345
10865	11355
10875	11365
10885	11375
10895	11385
10905	11395
10915	11405
10925	11415
10935	11425
10945	11435
10955	11445
10965	11455
10975	11465
10985	11475
10995	11485
11005	11495
11015	11505
11025	11515
11035	11525
11045	11535
11055	11545
11065	11555
11075	11565
11085	11575
11095	11585
11105	11595
11115	11605
11125	11615
11135/1/	11625 /2/
11145/1/	11635 /1/
11155/1/	11645 /1/
11165/1/	11655 /1/

11175/1/	11665 /1/
11185/1/	11685 /1/
11195/1/	11695 /1/

/1/ Alternate channels. These channels are set aside for narrow bandwidth systems and should be used only if all other channels are blocked.

/2/ These frequencies may be assigned for unpaired use.

(6) 30 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
10715	11215
10755	11245
10795	11285
10835	11325
10875	11365
10915	11405
10955	11445
10995	11485
11035	11525
11075	11565
11115	11605
11155 /1/	11645 /1/
11185 /1/	11685 /1/

/1/ Alternate channels These channels are set aside for narrow bandwidth systems and should be used only if all other channels are blocked.

(7) 40 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
10735	11225
10775	11265
10815	11305
10855	11345
10895	11385
10935	11425
10975	11465
11015	11505
11055	11545
11095	11585
11135 /1/	11625 /1/
11175 /1/	11665 /1/

/1/ Alternate channels. These channels are set aside for narrow bandwidth systems and

should be used only if all other channels are blocked.

(l) 12,200-12,700 MHz: The Commission has allocated the 12.2-12.7 GHz band for use by the broadcasting-satellite service. Operational-fixed stations authorized after September 9, 1983 will be licensed on a noninterference basis and are required to make any and all adjustments necessary to prevent interference to operating domestic broadcasting-satellite systems. Notwithstanding any other provisions, no operational-fixed stations are permitted to cause interference to broadcasting-satellite stations of other countries operating in accordance with the Region 2 plan for the broadcasting-satellite service established at the 1983 RARC.

(m) 17700-19700 MHz

Note.--Stations authorized as of September 9, 1983 to use frequencies in this band may, upon proper application, continue to be authorized for such operations.

(1) 2 MHz maximum authorized bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
18141.0	n/a

(2) 5 MHz maximum authorized bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
18762.5	19102.5
18767.5	19107.5
18772.5	19112.5
18777.5	19117.5
18782.5	19122.5
18787.5	19127.5
18792.5	19132.5
18797.5	19137.5
18802.5	19142.5
18807.5	19147.5
18812.5	19152.5
18817.5	19157.5

(3) 6 MHz maximum authorized bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
18145.0	n/a
18151.0	18367.0
18157.0	18373.0
18163.0	18379.0

18169.0	.....	18385.0
18175.0	.....	18391.0
18181.0	.....	18397.0
18187.0	.....	18403.0
18193.0	.....	18409.0
18199.0	.....	18415.0
18205.0	.....	18421.0
18211.0	.....	18427.0
18217.0	.....	18433.0
18223.0	.....	18439.0
18229.0	.....	18445.0
18235.0	.....	18451.0
18241.0	.....	18457.0
18247.0	.....	18463.0
18253.0	.....	18469.0
18259.0	.....	18475.0
18265.0	.....	18481.0
18271.0	.....	18487.0
18277.0	.....	18493.0
18283.0	.....	18499.0
18289.0	.....	18505.0
18295.0	.....	18511.0
18301.0	.....	18517.0
18307.0	.....	18523.0
18313.0	.....	18529.0
18319.0	.....	18535.0
18325.0	.....	18541.0
18331.0	.....	18547.0
18337.0	.....	18553.0
18343.0	.....	18559.0
18349.0	.....	18565.0
18355.0	.....	18571.0
18361.0	.....	18577.0

(4) 10 MHz maximum authorized bandwidth channels:

Transmit (receive) (MHz)		Receive (transmit) (MHz)
17705.0	.....	19265.0
17715.0	.....	19275.0
17725.0	.....	19285.0
17735.0	.....	19295.0
17745.0	.....	19305.0
17755.0	.....	19315.0
17765.0	.....	19325.0
17775.0	.....	19335.0
17785.0	.....	19345.0
17795.0	.....	19355.0
17805.0	.....	19365.0
17815.0	.....	19375.0

17825.0 ..... 19385.0
17835.0 ..... 19395.0
17845.0 ..... 19405.0
17855.0 ..... 19415.0
17865.0 ..... 19425.0
17875.0 ..... 19435.0
17885.0 ..... 19445.0
17895.0 ..... 19455.0
17905.0 ..... 19465.0
17915.0 ..... 19475.0
17925.0 ..... 19485.0
17935.0 ..... 19495.0
17945.0 ..... 19505.0
17955.0 ..... 19515.0
17965.0 ..... 19525.0
17975.0 ..... 19535.0
17985.0 ..... 19545.0
17995.0 ..... 19555.0
18005.0 ..... 18565.0
18015.0 ..... 19575.0
18025.0 ..... 19585.0
18035.0 ..... 19595.0
18045.0 ..... 19605.0
18055.0 ..... 19615.0
18065.0 ..... 19625.0
18075.0 ..... 19635.0
18085.0 ..... 19645.0
18095.0 ..... 19655.0
18105.0 ..... 19665.0
18115.0 ..... 19675.0
18125.0 ..... 19685.0
18135.0 ..... 19695.0
18585.0 ..... 18925.0
18595.0 ..... 18935.0
18605.0 ..... 18945.0
18615.0 ..... 18955.0
18625.0 ..... 18965.0
18635.0 ..... 18975.0
18645.0 ..... 18985.0
18655.0 ..... 18995.0
18665.0 ..... 19005.0
18675.0 ..... 19015.0
18685.0 ..... 19025.0
18695.0 ..... 19035.0
18705.0 ..... 19045.0
18715.0 ..... 19055.0
18725.0 ..... 19865.0
18735.0 ..... 19075.0
18745.0 ..... 19085.0
18755.0 ..... 19095.0
18765.0 ..... 19105.0
18775.0 ..... 19115.0

18785.0	.....	19125.0
18795.0	.....	19135.0
18805.0	.....	19145.0
18815.0	.....	19155.0

(5) 20 MHz maximum authorized bandwidth channels:

Transmit (receive) (MHz)		Receive (transmit) (MHz)
17710.0	.....	19270.0
17730.0	.....	19290.0
17750.0	.....	19310.0
17770.0	.....	19330.0
17790.0	.....	19350.0
17810.0	.....	19370.0
17830.0	.....	19390.0
17850.0	.....	19410.0
17870.0	.....	19430.0
17890.0	.....	19450.0
17910.0	.....	19470.0
17930.0	.....	19490.0
17950.0	.....	19510.0
17970.0	.....	19530.0
17990.0	.....	19550.0
18010.0	.....	19570.0
18030.0	.....	19590.0
18050.0	.....	19610.0
18070.0	.....	19630.0
18090.0	.....	19650.0
18110.0	.....	19670.0
18130.0	.....	19690.0
18590.0	.....	18930.0
18610.0	.....	18950.0
18630.0	.....	18970.0
18650.0	.....	18990.0
18670.0	.....	19010.0
18690.0	.....	19030.0
18710.0	.....	19050.0
18730.0	.....	19070.0
18750.0	.....	19090.0
18770.0	.....	19110.0
18790.0	.....	19130.0
18810.0	.....	19150.0

(6) 40 MHz maximum authorized bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)

17720.0	19280.0
17760.0	19320.0
17800.0	19360.0
17840.0	19400.0
17880.0	19440.0
17920.0	19480.0
17960.0	19520.0
18000.0	19560.0
18040.0	19600.0
18080.0	19640.0
18120.0	19680.0

(7) 80 MHz maximum authorized bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
17740.0	19300.0
17820.0	19380.0
17900.0	19460.0
17980.0	19540.0
18060.0	19620.0

(8) The following frequencies are available for point-to-multipoint systems, except that systems licensed, in operation, or applied for in the 10,565-10,615 and 10,630-10,680 MHz bands prior to July 15, 1993 are permitted to use frequencies in those bands if they prior coordinate with 10 GHz point-to-point licensees:

	Nodal station	User station
Channel No.	Frequency band (MHz) limits	Frequency band (MHz) limits
25	18,820-18,830	19,160-19,170
26	18,830-18,840	19,170-19,180
27	18,840-18,850	19,180-19,190
28	18,850-18,860	19,190-19,200
29	18,860-18,870	19,200-19,210

(i) Each station will be limited to one frequency pair per SMSA. Additional channel pairs may be assigned upon a showing that the service to be provided will fully utilize the spectrum requested. A channel pair may be subdivided as desired by the licensee.

(ii) A frequency pair may be assigned to more than one licensee in the same SMSA or service area so long as the interference protection criteria of § 101.105 are met.

(n) 31.0 to 31.3 GHz. These frequencies are shared on a coequal basis with other stations in the fixed and mobile services (see Parts 21, 74, 78 and 95). No interference protection is afforded to fixed or mobile stations operating in this band.

(1) 25 MHz authorized bandwidth channels, 150 MHz separation.

Transmit (receive) (MHz)	Receive (transmit) (MHz)
31,012.5	31,162.5
31,037.5	31,187.5
31,062.5	31,212.5
31,087.5	31,237.5
31,112.5	31,262.5
31,137.5	31,287.5

(2) 50 MHz authorized bandwidth channels, 150 MHz separation.

Transmit (receive) (MHz)	Receive (transmit) (MHz)
31,025.0	31,175.0
31,075.0	31,225.0
31,125.0	31,275.0

(o) Except as provided for in § 101.605, frequencies in bands authorized above 21.2 GHz are not paired and will be as specified in the authorization.

(p) 6425 to 6525 MHz–Mobile. Paired and un-paired operations permitted. Use of this spectrum for direct delivery of video programs to the general public or multi-channel cable distribution is not permitted. This band is co-equally shared with mobile stations licensed pursuant to Parts 21, 74 and 78 of the Commission's Rules. Stations not intended to be operated while in motion will be licensed under the provision of § 101.13(b). The following channel plans apply.

(1) 1 MHz maximum authorized bandwidth channels.

Transmit (or receive) (MHz)	Receive (or transmit) (MHz)
6425.5	6575.5
6450.5	6500.5

(2) 8 MHz maximum authorized bandwidth channels.

Transmit (or receive) (MHz)	Receive (or transmit) (MHz)
6430.0	6480.0

6438.0	6488.0
6446.0	6596.0
6455.0	6505.0
6463.0	6513.0
6471.0	6521.0

(3) 25 MHz maximum authorized bandwidth channels.

Transmit (or receive) (MHz)	Receive (or transmit) (MHz)
6437.5	6487.5
6462.5	6512.5

(q) Fixed systems licensed, in operation, or applied for in the 6525-6875 and 10,550-10,680 MHz bands prior to July 15, 1993 are permitted to use channel plans in effect prior to that date, including adding channels under those plans.

(r) Frequency diversity transmission will not be authorized in this service in the absence of a factual showing that the required communications cannot practically be achieved by other means. Where frequency diversity is deemed to be justified on a protection channel basis, it must be limited to one protection channel for the bands 3700-4200, 5925-6425, and 6525-6875 MHz, and a ratio of one protection channel for three working channels for the bands 10,550-10,680 and 10,700-11,700 MHz. In the bands 3700-4200, 5925-6425, and 6525-6875 MHz, no frequency diversity protection channel will be authorized unless there is a minimum of three working channels, except that where a substantial showing is made that a total of three working channels will be required within three years, a protection channel may be authorized simultaneously with the first working channel. A protection channel authorized under such exception will be subject to termination if applications for the third working channel are not filed within three years of the grant date of the applications for the first working channel. Where equipment employing digital modulation techniques with cross-polarized operation on the same frequency is used, the protection channel authorized under the above conditions may be considered to consist of both polarizations of the protection frequency where such is shown to be necessary.

§ 101.607 Maximum authorized bandwidth

The maximum bandwidth which will be authorized per frequency assigned is set out in the table that follows. Regardless of the maximum authorized bandwidth specified for each frequency band, the Commission reserves the right to issue a license for less than the maximum bandwidth if it appears that a lesser bandwidth would be sufficient to support an applicant's intended communications.

Frequency band MHz	Maximum authorized bandwidth
928-929	12.5, 25 kHz /1/ /6/
932-932.5, 941-941.5	12.5 kHz /1/
932.5-935, 941.5-944	25, 50, 100, 200 kHz /1/
952-960	12.5, 25, 50, 100, 200 kHz /1/ /5/
1850-1990 MHz	5 or 10 MHz /1/
2130-2150 MHz	800 or 1600 kHz /1/
2150-2160 MHz	10 MHz
2180-2200 MHz	800 or 1600 kHz /1/

2450-2483.5	625 kHz /2/
2483.5-2500	800 kHz
6425-6525	25
6525-6875 MHz	5 or 10 MHz /1/
10,550-10,680	5
12,200 to 12,700	10 or 20 1
13,200 to 13,250	25
17,700 to 18,140	80
18,140 to 18,142	2
18,142 to 18,580	6
18,580 to 18,820	20
18,820 to 18,920	10
18,920 to 19,160	20
19,160 to 19,260	10
19,260 to 19,700	80
21,200-23,600 MHz	up to 100 MHz /4/
31,000 to 31,300	25 or 50 MHz
38,600-40,000 MHz	up to 50 MHz
Bands above 40,000 MHz /3/	

/1/ The maximum bandwidth that will be authorized for each particular frequency in this band is detailed in the appropriate frequency table in § 101.605.

/2/ 1250 kHz, 1875 kHz, or 2500 kHz on a case-by-case basis.

/3/ To be specified in authorization.

/4/ For exceptions see § 101.605(m).

/5/ A 12.5 bandwidth applies only to frequencies listed § 101.605(a)(1).

/6/ For frequencies listed in § 101.605(a)(1), consideration will be given on a case-by-case basis to authorizing bandwidths up to 50 kHz.

§ 101.609 Technical standards for stations authorized prior to July 1, 1976. Except as otherwise required by § 101.605(a)(1), the technical standards in this section apply to private microwave systems that were authorized between July 20, 1961, and July 1, 1976. These standards are not applicable to transmitting equipment, including antennas, authorized to be operated prior to July 20, 1961, or for which an authorization was issued based on an application filed with the Commission prior to July 20, 1961.

Microwave Technical Standards Table

Frequency band-- megahertz	Power /1/ (watts)	Tolerance (percent)	Bandwidth /2/	Beamwidth /3/ (degrees)
952-960	/7/ 30	0.0005	100 kHz	/6/ 20
1850-1960	18	.02	8 MHz	10
2130-2150	15	.001	800 kHz	10
2150-2160	15	.001	10 MHz	360
2180-2200	15	.001	800 kHz	10
2450-2500 /4/	12	/5/	/5/	/5/
6525-6575	7	.02	25 MHz	7
6575-6875	7	.02	10 MHz	5
10550-10680	5	/5/	25 MHz	4
12200-12700	5	.05	20 MHz	4
Above 16000	5	/5/	50 MHz	/5/

/1/ Maximum rated power output of transmitter. Power in excess of that shown herein will be authorized only if specifically provided on a particular frequency or under exceptional circumstances based upon a factual showing of need. For pulsed systems average power is limited to the values shown, peak power must not exceed five times this limit.

/2/ Maximum bandwidth (necessary or occupied, whichever is greater) which will be authorized. Except in the 2130-2150 and 2180-2200 MHz bands, consideration will be given, on a case-by-case basis, to requests for additional adjacent channels based upon a complete and specific factual showing of unique or unusual circumstances, apart from economic considerations, requiring such additional channels. In the band 952-960 MHz, bandwidths up to 500 kHz may be authorized.

/3/ Maximum beamwidth of major lobe between 0.5 power points in horizontal plane. Exceptions may be granted for stations in remote areas or until harmful interference is caused to other stations operating in accordance with these provisions.

/4/ Subject to no protection from ISM equipment on 2450 MHz.

/5/ To be specified in the station authorization. Stations authorized in the band 2500-2690 MHz prior to July 16, 1971, may continue to be authorized on a coequal basis to other stations operating in accordance with the Table of Frequency allocations. No expansion of existing systems on frequencies not allocated to this service will be permitted. Additional stations or new assignments may be authorized only in accordance with the provisions of this section.

/6/ Except for the frequencies 952.1, 952.2, 952.3, 952.4, 956.4, 956.5, 959.8, and 959.9 MHz where the antenna may be omnidirectional, and except for the frequencies 952.8, 952.9, 956.2, and 956.3 MHz which may be used only with directional antennas with a minimum gain of 7.5 dBd in the major lobe and no more than –3 dBd gain in any direction 90° or more off the axis of the major lobe.

/7/ Except for the frequencies 952.4, 952.2, 952.3, 952.4, 956.4, 956.5, 959.8, and 959.9 MHz where the maximum power may be 100W.

Subpart I--Point-to-Point Microwave Radio Service

§ 101.701 Eligibility.

(a) Authorizations for stations in this service will be issued to existing and proposed common carriers. Applications will be granted only in cases in which it is shown that:

(1) The applicant is legally, technically, financially and otherwise qualified to render the proposed service;
(2) There are frequencies available to enable the applicant to render a satisfactory service; and
(3) The public interest, convenience, and necessity would be served by a grant thereof.

(b) If the content is originated, selected, controlled, or otherwise substantively influenced by the applicant, licensee, or a closely affiliated entity, no station or radio frequency in this service will be authorized, or may be utilized, to transmit any closed circuit television signals or television signals other than broadcast television signals, unless:
(1) Such service is otherwise permitted for a specific length of time by grant of an acceptable petition for waiver of this rule; or
(2) Such service is otherwise permitted by a condition in the applicable instrument of authorization; or
(3) Such service is provided pursuant to applicable FCC tariff and is temporary and occasional intra-company television communication for management, network supervision, or other internal carrier functions.

For purposes of this paragraph, an entity will be considered to be "closely affiliated" with an applicant if it is in a parent-subsidiary relationship, or both are commonly controlled, or they have any common officers or management employees.

(c) Applications for stations or frequencies that will be used primarily to relay broadcast television signals must include a demonstration (including appropriate system diagrams and tables) that at least fifty percent of the customers (or points of service) on the microwave system involved, including those served through an interconnecting carrier(s), receiving applicant's service, will not be related or affiliated in any degree with the applicant, and that the proposed usage by such customers, in terms of hours of use and channels delivered, must constitute at least fifty percent of the usage of the applicant's microwave service. Applications that do not contain these demonstrations will be returned as unacceptable for filing.

§ 101.703 Frequencies.

(a) Frequencies in the following bands are available for assignment to fixed radio stations in the Point-to-Point Microwave Radio Service.

932.5-935 MHz /17/	13,200-13,250 MHz /4/
941.5-944 MHz /17/ /18/	17,700-18,820 MHz /5/ /10/ /15/
2,110-2,130 MHz /1/ /3/ /7/ /20/	18,920-19,160 MHz /5/ /10/ /15/
2,160-2,180 MHz /1/ /2/ /20/ /21/	19,260-19,700 MHz /5/ /10/ /15/
3,700-4,200 MHz /8/ /14/	21,200-22,000 MHz /4/ /11/ /12/ /13/
5,925-6,425 MHz /6/ /14/	22,000-23,600 MHz /4/ /11/ /12/
6,525-6,875 MHz /14/	27,500-29,500 MHz /5/
10,550-10,680 MHz /19/	31,000-31,300 MHz /16/
10,700-11,700 MHz /8/ /9/ /19/	38,600-40,000 MHz /4/

/1/ Frequencies in this band are shared with control and repeater stations in the Domestic Public Land Mobile Radio Service and with stations in the International Fixed Public Radiocommunication Services located south of 25° 30' north latitude in the State of Florida and U.S. possessions in the Caribbean area. Additionally, the band 2160-2162 MHz is shared with stations in the Multipoint Distribution Service.

/2/ Except upon a showing that no alternative frequencies are available, no new assignments will be made in the band 2160-2162 MHz for stations located within 80.5 kilometers (50 miles) of the coordinates of the cities listed in § 21.901(c) of this chapter.

/3/ Television transmission in this band is not authorized and radio frequency channel widths may not exceed 3.5 MHz.

/4/ Frequencies in this band are shared with fixed and mobile stations licensed in other services.

/5/ Frequencies in this band are shared with stations in the fixed- satellite service.

/6/ These frequencies are not available for assignment to mobile earth stations.

/7/ Frequencies in the band 2110-2120 MHz may be authorized on a case-by- case basis to Government or non-Government space research earth stations for telecommand purposes in connection with deep space research.

/8/ This frequency band is shared with station(s) in the Local Television Transmission Service and, in the U.S. Possessions in the Caribbean area, with stations in the International Fixed Public Radiocommunications Services.

/9/ The band segments 10.95-11.2 and 11.45-11.7 GHz are shared with space stations (space to earth) in the fixed-satellite service.

/10/ This band is co-equally shared with stations in the fixed services under Parts 74, 78, and 101 of the Commission's Rules.

/11/ Frequencies in this band are shared with Government stations.

/12/ Assignments to common carriers in this band are normally made in the segments 21.2-21.8 GHz and 22.4-23.0 GHz and to operational fixed users in the segments 21.8-22.4 GHz and 23.0-23.6 GHz. Assignments may be made otherwise only upon a showing that no interference free frequencies are available in the appropriate band segments.

/13/ Frequencies in this band are shared with stations in the earth exploration satellite service (space to earth).

/14/ Frequencies in this band are shared with stations in the fixed-satellite and private-operational fixed microwave services.

/15/ Stations licensed as of September 9, 1983 to use frequencies in the 17.7-19.7 GHz band may, upon proper application, continue to be authorized for such operation.

/16/ Frequencies in this band are co-equally shared with stations in the Auxiliary Broadcasting (Part 74), Cable Television Relay (Part 78), Private Operational-Fixed Microwave (Subpart H) and General Mobile Radio (Part 95) Services.

/17/ Frequencies in these bands are shared with Government fixed stations and stations in the Private Operational-Fixed Microwave Service (Subpart H).

/18/ Frequencies in the 942 to 944 MHz band are also shared with broadcast auxiliary stations (Part 74).

/19/ Frequencies in this band are shared with stations in the private-operational fixed microwave service.

/20/ New facilities in these bands will be licensed only on a secondary basis. Facilities licensed or applied before January 16, 1992, are permitted to make modifications and minor extensions and retain their primary status.

/21/ Any authorization of additional stations to use the 2160-2162 MHz band for Multipoint Distribution Service applied for after January 16, 1992 will be secondary to use of the band for emerging technology services.

(b) Applications for new stations or frequency paths (except for power splits of existing frequency paths)

in the bands 3,700-4,200 MHz and 5,925- 6,425 MHz which are to be used to relay television signals to community antenna television systems will not be accepted for filing or granted: Provided, however, That waivers of this provision may be granted for good cause shown, including a showing that the proposed frequency usage is not likely to affect adversely the development of any major communications route; and Provided further, That such waivers will not be granted, absent a showing of compelling and unusual circumstances, for new stations or frequency paths (except for power splits of existing frequency paths) within 80.5 kilometers (50 miles) of the coordinates of the principal city, as set forth in the U.S. Department of Commerce publication "Air Line Distance Between Cities in the United States," of one of the top 25 standard metropolitan statistical areas, as ranked by the U.S. Census Bureau.

(c) 932.5-935 MHz and 941.5-944 MHz. 200 kHz maximum authorized bandwidth, 9 MHz separation:

(1) 25 kHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
932.5125	941.5125
932.5375	941.5375
932.5625	941.5625
932.5875	941.5875
932.6125	941.6125
932.6375	941.6375
932.6625	941.6625
934.8375	943.8375
934.8625	943.8625
934.8875	943.8875
934.9125	943.9125
934.9375	943.9375
934.9625	943.9625
934.9875	943.9875

(2) 50 kHz channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
932.7000	941.7000
932.7500	941.7500
934.8000	943.8000

(3) 100 kHz channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
932.8250	941.8250
932.9250	941.9250
933.0250	942.0250
934.5250	943.5250

934.6250	943.6250
934.7250	943.7250

(4) 200 kHz channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
933.1750	942.1750
933.3750	942.3750
933.5750	942.5750
933.7750	942.7750
933.9750	942.9750
934.1750	943.1750
934.3750	943.3750

(d) 3.700 to 4.200 MHz. 20 MHz maximum authorized bandwidth.

20 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
3710	3750
3730	3770
3790	3830
3810	3850
3870	3910
3890	3930
3950	3990
3970	4010
4030	4070
4050	4090
4110	4150
4130	4170
n/a	4190 /1/

/1/ This frequency may be assigned for unpaired use.

(e) 5.925 to 6.425 MHz. 30 MHz authorized bandwidth.

(1) 400 kHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
5925.225	6177.100

5925.625	6177.500
5926.050	6177.925
5926.450	6178.325
5926.875	6178.750
5927.275	6179.150
5927.725	6179.600
5928.125	6180.000
5928.550	6180.425
5928.950	6180.825
5929.375	6181.250
5929.775	6181.650
6168.350	6420.225
6168.750	6420.625
6169.175	6421.050
6169.575	6421.450
6170.000	6421.875
6170.400	6422.275
6170.850	6422.725
6171.250	6423.125
6171.675	6423.550
6172.075	6423.950
6172.500	6424.375
6172.900	6424.775

(2) 800 kHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
5925.425	6177.300
5926.250	6178.125
5927.075	6178.950
5927.925	6179.800
5928.750	6180.625
5929.575	6181.450
6168.550	6420.425
6169.375	6421.250
6170.200	6422.075
6171.050	6422.925
6171.875	6423.750
6172.700	6424.575

(3) 1.25 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
5925.625	6177.500

5926.875 ..... 6178.750
5928.125 ..... 6180.000
5929.375 ..... 6181.250
6108.893 ..... 6360.933
6110.128 ..... 6362.168
6111.364 ..... 6363.404
6112.599 ..... 6364.639
6113.834 ..... 6365.874
6115.070 ..... 6367.110
6116.305 ..... 6368.345
6117.541 ..... 6369.581
6118.776 ..... 6370.816
6120.011 ..... 6372.051
6121.247 ..... 6373.287
6122.482 ..... 6374.522
6123.718 ..... 6375.758
6124.953 ..... 6376.993
6126.189 ..... 6378.229
6127.424 ..... 6379.464
6128.659 ..... 6380.699
6129.895 ..... 6381.935
6131.130 ..... 6383.170
6132.366 ..... 6384.406
6133.601 ..... 6385.641
6134.836 ..... 6386.876
6136.072 ..... 6388.112
6137.307 ..... 6389.347
6138.543 ..... 6390.583
6139.778 ..... 6391.818
6141.014 ..... 6393.054
6142.249 ..... 6394.289
6143.484 ..... 6395.524
6144.720 ..... 6396.760
6145.955 ..... 6397.995
6147.191 ..... 6399.231
6148.426 ..... 6400.466
6149.661 ..... 6401.701
6150.897 ..... 6402.937
6152.132 ..... 6404.172
6153.368 ..... 6405.408
6154.603 ..... 6406.643
6155.839 ..... 6407.879
6157.074 ..... 6409.114
6158.309 ..... 6410.349
6159.545 ..... 6411.585
6160.780 ..... 6412.820
6162.016 ..... 6414.056
6163.251 ..... 6415.291
6164.486 ..... 6416.526
6165.722 ..... 6417.762
6166.957 ..... 6418.997
6168.750 ..... 6420.625

6170.000	.....	6421.875
6171.250	.....	6423.125
6172.500	.....	6424.375
6173.750 1	.....	n/a
6175.000 1	.....	n/a
6176.250 1	.....	n/a

1 - These frequencies may be assigned for unpaired use.

(4) 2.5 MHz bandwidth channels:

Transmit (receive) (MHz)		Receive (transmit) (MHz)
5926.250	.....	6178.125
5928.750	.....	6180.625
6109.510	.....	6361.550
6111.981	.....	6364.021
6114.452	.....	6366.492
6116.923	.....	6368.963
6119.394	.....	6371.434
6121.865	.....	6373.905
6124.335	.....	6376.375
6126.806	.....	6378.846
6129.277	.....	6381.317
6131.748	.....	6383.788
6134.219	.....	6386.259
6136.690	.....	6388.730
6139.160	.....	6391.200
6141.631	.....	6393.671
6144.102	.....	6396.142
6146.573	.....	6398.613
6149.044	.....	6401.084
6151.515	.....	6403.555
6153.985	.....	6406.025
6156.456	.....	6408.496
6158.927	.....	6410.967
6161.398	.....	6413.438
6163.869	.....	6415.909
6166.340	.....	6418.380
6169.375	.....	6421.250
6171.875	.....	6423.750
6175.625 /1/	.....	n/a

/1/ This frequency may be assigned for unpaired use.

(5) 3.75 MHz bandwidth channels:

Transmit	Receive

(receive) (MHz)		(transmit) (MHz)
6111.364	.....	6363.404
6116.305	.....	6368.345
6121.247	.....	6373.287
6126.189	.....	6378.229
6131.130	.....	6383.170
6136.072	.....	6388.112
6141.014	.....	6393.054
6145.955	.....	6397.995
6150.897	.....	6402.937
6155.839	.....	6407.879
6160.780	.....	6412.820
6165.722	.....	6417.762
6175.000 /1/	.....	n/a

/1/ This frequency may be assigned for unpaired use.

(6) 5 MHz bandwidth channels:

Transmit (receive) (MHz)		Receive (transmit) (MHz)
6110.75	.....	6362.79
6115.69	.....	6367.73
6120.63	.....	6372.67
6125.57	.....	6377.61
6130.51	.....	6382.55
6135.45	.....	6387.49
6140.40	.....	6392.44
6145.34	.....	6397.38
6150.28	.....	6402.32
6155.22	.....	6407.26
6160.16	.....	6412.20
6165.10	.....	6417.14

(7) 10 MHz bandwidth channels:

Transmit (receive) (MHz)		Receive (transmit) (MHz)
5935.32	.....	6187.36
5945.20	.....	6197.24
5955.08	.....	6207.12
5964.97	.....	6217.01
5974.85	.....	6226.89
5984.73	.....	6236.77

5994.62	6246.66
6004.50	6256.54
6014.38	6266.42
6024.27	6276.31
6034.15	6286.19
6044.03	6296.07
6053.92	6305.96
6063.80	6315.84
6073.68	6325.72
6083.57	6335.61
6093.45	6345.49
6103.33	6355.37
6113.22 /1/	6365.26 /1/
6123.10 /1/	6375.14 /1/
6132.98 /1/	6385.02 /1/
6142.87 /1/	6394.91 /1/
6152.75 /1/	6404.79 /1/
6162.63 /1/	6414.67 /1/

/1/ Alternate channels. These channels are set aside for narrow bandwidth systems and should be used only if all other channels are blocked.

(8) 30 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
5945.20	6197.24
5974.85	6226.89
6004.50	6256.54
6034.15	6286.19
6063.80	6315.84
6093.45	6345.49
6123.10 /1/	6375.14 /1/
6152.75 /1/	6404.79 /1/

/1/ Alternate channels. These channels are set aside for narrow bandwidth systems and should be used only if all other channels are blocked.

(f) 6.525 to 6.875 MHz. 10 MHz authorized bandwidth.

(1) 400 kHz bandwidth channels

Transmit (receive) (MHz)	Receive (transmit) (MHz)
6525.225	6870.225
6525.625	6870.625

6526.050	6871.050
6526.450	6871.450
6526.875	6871.875
6527.275	6872.275
6527.725	6872.725
6528.125	6873.125
6528.550	6873.550
6528.950	6873.950
6529.375	6874.375
6529.775	6874.775

(2) 800 kHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
6525.425	6870.425
6526.250	6871.250
6527.075	6872.075
6527.925	6872.925
6528.750	6873.750
6529.575	6874.575

(3) 1.25 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
6525.625	6870.625
6526.875	6871.875
6528.125	6873.125
6529.375	6874.375
6540.625 /1/	6718.125 /1/
6541.875 /1/	6719.375 /1/
6543.125 /1/	6713.125 /1/
6544.375 /1/	6714.375 /1/
6545.625 /1/	6715.625 /1/
6546.875 /1/	6716.875 /1/
6548.125	6728.125
6549.375	6729.375
6550.625	6730.625
6551.875	6731.875
6553.125 /1/	6723.125 /1/
6554.375 /1/	6724.375 /1/
6555.625 /1/	6725.625 /1/
6556.875 /1/	6726.875 /1/
6558.125	6738.125
6559.375	6739.375

6560.625 ..... 6740.625
6561.875 ..... 6741.875
6563.125 ..... 6733.125
6564.375 ..... 6734.375
6565.625 ..... 6735.625
6566.875 ..... 6736.875
6568.125 /1/ .....6720.625 /1/
6569.375 /1/ .....6721.875 /1/
6580.625 /1/ .....6868.125 /1/
6581.875 /1/ .....6869.375 /1/
6583.125 ..... 6743.125
6584.375 ..... 6744.375
6585.625 ..... 6745.625
6586.875 ..... 6746.875
6588.125 ..... 6748.125
6589.375 ..... 6749.375
6590.625 ..... 6750.625
6591.875 ..... 6751.875
6593.125 ..... 6753.125
6594.375 ..... 6754.375
6595.625 ..... 6755.625
6596.875 ..... 6756.875
6598.125 ..... 6758.125
6599.375 ..... 6759.375
6600.625 ..... 6760.625
6601.875 ..... 6761.875
6603.125 ..... 6763.125
6604.375 ..... 6764.375
6605.625 ..... 6765.625
6606.875 ..... 6766.875
6608.125 ..... 6768.125
6609.375 ..... 6769.375
6610.625 ..... 6770.625
6611.875 ..... 6771.875
6613.125 ..... 6773.125
6614.375 ..... 6774.375
6615.625 ..... 6775.625
6616.875 ..... 6776.875
6618.125 ..... 6778.125
6619.375 ..... 6779.375
6620.625 ..... 6780.625
6621.875 ..... 6781.875
6623.125 ..... 6783.125
6624.375 ..... 6784.375
6625.625 ..... 6785.625
6626.875 ..... 6786.875
6628.125 ..... 6788.125
6629.375 ..... 6789.375
6630.625 ..... 6790.625
6631.875 ..... 6791.875
6633.125 ..... 6793.125
6634.375 ..... 6794.375

6635.625 ..... 6795.625
6636.875 ..... 6796.875
6638.125 ..... 6798.125
6639.375 ..... 6799.375
6640.625 ..... 6800.625
6641.875 ..... 6801.875
6643.125 ..... 6803.125
6644.375 ..... 6804.375
6645.625 ..... 6805.625
6646.875 ..... 6806.875
6648.125 ..... 6808.125
6649.375 ..... 6809.375
6650.625 ..... 6810.625
6651.875 ..... 6811.875
6653.125 ..... 6813.125
6654.375 ..... 6814.375
6655.625 ..... 6815.625
6656.875 ..... 6816.875
6658.125 ..... 6818.125
6659.375 ..... 6819.375
6660.625 ..... 6820.625
6661.875 ..... 6821.875
6663.125 ..... 6823.125
6664.375 ..... 6824.375
6665.625 ..... 6825.625
6666.875 ..... 6826.875
6668.125 ..... 6828.125
6669.375 ..... 6829.375
6670.625 ..... 6830.625
6671.875 ..... 6831.875
6673.125 ..... 6833.125
6674.375 ..... 6834.375
6675.625 ..... 6835.625
6676.875 ..... 6836.875
6678.125 ..... 6838.125
6679.375 ..... 6839.375
6680.625 ..... 6840.625
6681.875 ..... 6841.875
6683.125 ..... 6843.125
6684.375 ..... 6844.375
6685.625 ..... 6845.625
6686.875 ..... 6846.875
6688.125 ..... 6848.125
6689.375 ..... 6849.375
6690.625 ..... 6850.625
6691.875 ..... 6851.875
6693.125 ..... 6853.125
6694.375 ..... 6854.375
6695.625 ..... 6855.625
6696.875 ..... 6856.875
6698.125 ..... 6858.125
6699.375 ..... 6859.375

6700.625	6860.625
6701.875	6861.875
6703.125	6863.125
6704.375	6864.375
6705.625	6865.625
6706.875	6866.875
6708.125 /1/	6710.625 /1/
6709.375 /1/	6711.875 /1/

/1/ These frequencies may be assigned for unpaired use.

(4) 2.5 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
6526.25	6871.25
6528.75	6873.75
6541.25 /1/	6718.75 /1/
6543.75 /1/	6713.75 /1/
6546.25 /1/	6716.25 /1/
6548.75	6728.75
6551.25	6731.25
6553.75 /1/	6723.75 /1/
6556.25 /1/	6726.25 /1/
6558.75	6738.75
6561.25	6741.25
6563.75	6733.75
6566.25	6736.25
6568.75 /1/	6721.25 /1/
6581.25 /1/	6868.75 /1/
6583.75	6743.75
6586.25	6746.25
6588.75	6748.75
6591.25	6751.25
6593.75	6753.75
6596.25	6756.25
6598.75	6758.75
6601.25	6761.25
6603.75	6763.75
6606.25	6766.25
6608.75	6768.75
6611.25	6771.25
6613.75	6773.75
6616.25	6776.25
6618.75	6778.75

6621.25	.....	6781.25
6623.75	.....	6783.75
6626.25	.....	6786.25
6628.75	.....	6788.75
6631.25	.....	6791.25
6633.75	.....	6793.75
6636.25	.....	6796.25
6638.75	.....	6798.75
6641.25	.....	6801.25
6643.75	.....	6803.75
6646.25	.....	6806.25
6648.75	.....	6808.75
6651.25	.....	6811.25
6653.75	.....	6813.75
6656.25	.....	6816.25
6658.75	.....	6818.75
6661.25	.....	6821.25
6663.75	.....	6823.75
6666.25	.....	6826.25
6668.75	.....	6828.75
6671.25	.....	6831.25
6673.75	.....	6833.75
6676.25	.....	6836.25
6678.75	.....	6838.75
6681.25	.....	6841.25
6683.75	.....	6843.75
6686.25	.....	6846.25
6688.75	.....	6848.75
6691.25	.....	6851.25
6693.75	.....	6853.75
6696.25	.....	6856.25
6698.75	.....	6858.75
6701.25	.....	6861.25
6703.75	.....	6863.75
6706.25	.....	6866.25
6708.75 /1/	.....	6711.25 /1/

/1/ These frequencies may be assigned for unpaired use.

(5) 3.75 MHz bandwidth channels:

Transmit (receive) (MHz)		Receive (transmit) (MHz)
6545.625 /1/	.....	6715.625 /1/
6550.625	.....	6730.625
6555.625 /1/	.....	6725.625 /1/
6560.625	.....	6740.625
6565.625	.....	6735.625
6585.625	.....	6745.625

6590.625	6750.625
6595.625	6755.625
6600.625	6760.625
6605.625	6765.625
6610.625	6770.625
6615.625	6775.625
6620.625	6780.625
6625.625	6785.625
6630.625	6790.625
6635.625	6795.625
6640.625	6800.625
6645.625	6805.625
6650.625	6810.625
6655.625	6815.625
6660.625	6820.625
6665.625	6825.625
6670.625	6830.625
6675.625	6835.625
6680.625	6840.625
6685.625	6845.625
6690.625	6850.625
6695.625	6855.625
6700.625	6860.625
6705.625	6865.625
6710.625 /1/	6720.625 /1/

/1/ These frequencies may be assigned for unpaired use.

(6) 5 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
6545 /1/	6715 /1/
6550	6730
6555 /1/	6725 /1/
6560	6740
6565	6735
6585	6745
6590	6750
6595	6755
6600	6760
6605	6765
6610	6770
6615	6775
6620	6780
6625	6785
6630	6790
6635	6795
6640	6800

6645	.....	6805
6650	.....	6810
6655	.....	6815
6660	.....	6820
6665	.....	6825
6670	.....	6830
6675	.....	6835
6680	.....	6840
6685	.....	6845
6690	.....	6850
6695	.....	6855
6700	.....	6860
6705	.....	6865
6710 /1/	.....	6720 /1/

/1/ These frequencies may be assigned for unpaired use.

(7) 10 MHz bandwidth channels:

Transmit (receive) (MHz)		Receive (transmit) (MHz)
6545 /1/	.....	6715 /1/
6555 /1/	.....	6725 /1/
6565	.....	6735
6585	.....	6745
6595	.....	6755
6605	.....	6765
6615	.....	6775
6625	.....	6785
6635	.....	6795
6645	.....	6805
6655	.....	6815
6665	.....	6825
6675	.....	6835
6685	.....	6845
6695	.....	6855
6705	.....	6865
6535 /2/	.....	6575 /2/

/1/ These frequencies may be assigned for unpaired use.
/2/ Available only for emergency restoration, maintenance bypass, or other temporary-fixed purposes. Such uses are authorized on a non-interference basis to other frequencies in this band. Interference analysis required by § 101.105 does not apply to this frequency pair.

(g) 10.550 to 10.680 MHz. 5 MHz authorized bandwidth.

(1) 400 kHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
10605.225	10670.225
10605.625	10670.625
10606.050	10671.050
10606.450	10671.450
10606.875	10671.875
10607.275	10672.275
10607.725	10672.725
10608.125	10673.125
10608.550	10673.550
10608.950	10673.950
10609.375	10674.375
10609.775	10674.775
10610.225	10675.225
10610.625	10675.625
10611.050	10676.050
10611.450	10676.450
10611.875	10676.875
10612.275	10677.275
10612.725	10677.725
10613.125	10678.125
10613.550	10678.550
10613.950	10678.950
10614.375	10679.375
10614.775	10679.775

(2) 800 kHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
10605.425	10670.425
10606.250	10671.250
10607.075	10672.075
10607.925	10672.925
10608.750	10673.750
10609.575	10674.575
10610.425	10675.425
10611.250	10676.250
10612.075	10677.075
10612.925	10677.925
10613.750	10678.750
10614.575	10679.575

(3) 1.25 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
10550.625	10615.625
10551.875	10616.875
10553.125	10618.125
10554.375	10619.375
10555.625	10620.625
10556.875	10621.875
10558.125	10623.125
10559.375	10624.375
10560.625	10625.625
10561.875	10626.875
10563.125	10628.125
10564.375	10629.375
10565.625	10630.625
10566.875	10631.875
10568.125	10633.125
10569.375	10634.375
10570.625	10635.625
10571.875	10636.875
10573.125	10638.125
10574.375	10639.375
10575.625	10640.625
10576.875	10641.875
10578.125	10643.125
10579.375	10644.375
10580.625	10645.625
10581.875	10646.875
10583.125	10648.125
10584.375	10649.375
10585.625	10650.625
10586.875	10651.875
10588.125	10653.125
10589.375	10654.375
10590.625	10655.625
10591.875	10656.875
10593.125	10658.125
10594.375	10659.375
10595.625	10660.625
10596.875	10661.875
10598.125	10663.125
10599.375	10664.375
10600.625	10665.625
10601.875	10666.875
10603.125	10668.125
10604.375	10669.375
10605.625	10670.625

10606.875	10671.875
10608.125	10673.125
10609.375	10674.375
10610.625	10675.625
10611.875	10676.875
10613.125	10678.125
10614.375	10679.375

/1/ These frequencies are also available for DTS stations licensed, in operation, or applied for prior to July 15, 1993.

(4) 2.5 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
10551.25	10616.25
10553.75	10618.75
10556.25	10621.25
10558.75	10623.75
10561.25	10626.25
10563.75	10628.75
10566.25	10631.25
10568.75	10633.75
10571.25	10636.25
10573.75	10638.75
10576.25	10641.25
10578.75	10643.75
10581.25 /1/	10646.25 /1/
10583.75 /1/	10648.75 /1/
10586.25 /1/	10651.25 /1/
10588.75 /1/	10653.75 /1/
10591.25 /1/	10656.25 /1/
10593.75 /1/	10658.75 /1/
10596.25 /1/	10661.25 /1/
10598.75 /1/	10663.75 /1/
10601.25 /1/	10666.25 /1/
10603.75 /1/	10668.75 /1/
10606.25 /1/	10671.25 //1
10608.75 /1/	10673.75 /1/
10611.25 /1/	10676.25 /1/
10613.75 /1/	10678.75 //1

/1/ These frequencies are also available for DTS stations licensed, in operation, or applied for prior to July 15, 1993.

(5) 3.75 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)

10553.125	10618.125
10558.125	10623.125
10563.125	10628.125
10568.125	10633.125
10573.125	10638.125
10578.125	10643.125
10583.125	10648.125
10588.125	10653.125
10593.125	10658.125
10598.125	10663.125
10603.125	10668.125

(6) 5 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
10552.5	10617.5
10557.5	10622.5
10562.5	10627.5
10567.5 /1/	10632.5 /1/
10572.5 /1/	10637.5 /1/
10577.5 /1/	10642.5 /1/
10582.5 /1/	10647.5 /1/
10587.5	10652.5
10592.5	10657.5
10597.5	10662.5
10602.5	10667.5

/1/ These frequencies are also available for DTS stations licensed, in operation, or applied for prior to July 15, 1993.

(h) 10.700 to 11.700 MHz. 40 MHz authorized bandwidth.

(1) 1.25 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
11130.625	11620.625
11131.875	11621.875
11133.125	11623.125
11134.375	11624.375
11135.625	11625.625
11136.875	11626.875
11138.125	11628.125
11139.375	11629.375
11140.625	11630.625

11141.875	11631.875
11143.125	11633.125
11144.375	11634.375
11145.625	11635.625
11146.875	11636.875
11148.125	11638.125
11149.375	11639.375
11150.625	11640.625
11151.875	11641.875
11153.125	11643.125
11154.375	11644.375
11155.625	11645.625
11156.875	11646.875
11158.125	11648.125
11159.375	11649.375
11160.625	11650.625
11161.875	11651.875
11163.125	11653.125
11164.375	11654.375
11165.625	11655.625
11166.875	11656.875
11168.125	11658.125
11169.375	11659.375
11170.625	11660.625
11171.875	11661.875
11173.125	11663.125
11174.375	11664.375
11175.625	11665.625
11176.875	11666.875
11178.125	11668.125
11179.375	11669.375
11180.625	11680.625
11181.875	11681.875
11183.125	11683.125
11184.375	11684.375
11185.625	11685.625
11186.875	11686.875
11188.125	11688.125
11189.375	11689.375
11190.625	11690.625
11191.875	11691.875
11193.125	11693.125
11194.375	11694.375
11195.625	11695.625
11196.875	11696.875
11198.125	11698.125
11199.375	11699.375

(2) 2.5 MHz bandwidth channels:

Transmit	Receive

(receive) (MHz)	(transmit) (MHz)
11131.25	11621.25
11133.75	11623.75
11136.25	11626.25
11138.75	11628.75
11141.25	11631.25
11143.75	11633.75
11146.25	11636.25
11148.75	11638.75
11151.25	11641.25
11153.75	11643.75
11156.25	11646.25
11158.75	11648.75
11161.25	11651.25
11163.75	11653.75
11166.25	11656.25
11168.75	11658.75
11171.25	11661.25
11173.75	11663.75
11176.25	11666.25
11178.75	11668.75
11181.25	11681.25
11183.75	11683.75
11186.25	11686.25
11188.75	11688.75
11191.25	11691.25
11193.75	11693.75
11196.25	11696.25
11198.75	11698.75

(3) 3.75 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
11133.125	11623.125
11138.125	11628.125
11143.125	11633.125
11148.125	11638.125
11153.125	11643.125
11158.125	11648.125
11163.125	11653.125
11168.125	11658.125
11173.125	11663.125
11178.125	11668.125
11183.125	11683.125
11188.125	11688.125
11193.125	11693.125
11198.125	11698.125

(4) 5 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
11132.5	11622.5
11137.5	11627.5
11142.5	11632.5
11147.5	11637.5
11152.5	11642.5
11157.5	11647.5
11162.5	11652.5
11167.5	11657.5
11172.5	11662.5
11177.5	11667.5
11182.5	11682.5
11187.5	11687.5
11192.5	11692.5
11197.5	11697.5

(5) 10 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
10705	11205
10715	11215
10725 /2/	11675 /1/
10735	11225
10745	11235
10755	11245
10765	11255
10775	11265
10785	11275
10795	11285
10805	11295
10815	11305
10825	11315
10835	11325
10845	11335
10855	11345
10865	11355
10875	11365
10885	11375
10895	11385
10905	11395
10915	11405

10925	11415
10935	11425
10945	11435
10955	11445
10965	11455
10975	11465
10985	11475
10995	11485
11005	11495
11015	11505
11025	11515
11035	11525
11045	11535
11055	11545
11065	11555
11075	11565
11085	11575
11095	11585
11105	11595
11115	11605
11125	11615
11135 /1/	11625 /2/
11145 /1/	11635 /1/
11155 /1/	11645 /1/
11165 /1/	11655 /1/
11175 /1/	11665 /1/
11185 /1/	11685 /1/
11195 /1/	11695 /1/

/1/ Alternate channels. These channels are set aside for narrow bandwidth systems and should be used only if all other channels are blocked.
/2/ These frequencies may be assigned for unpaired use.

(6) 30 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
10715	11215
10755	11245
10795	11285
10835	11325
10875	11365
10915	11405
10955	11445
10995	11485
11035	11525
11075	11565
11115	11605
11155 /1/	11645 /1/

11185 /1/ .....11685 /1/

/1/ Alternate channels. These channels are set aside for narrow bandwidth systems and should be used only if all other channels are blocked.

(7) 40 MHz bandwidth channels: /2/

Transmit (receive) (MHz)	Receive (transmit) (MHz)
10735	11225
10775	11265
10815	11305
10855	11345
10895	11385
10935	11425
10975	11465
11015	11505
11055	11545
11095	11585
11135 /1/	11625 /1/
11175 /1/	11665 /1/

/1/ Alternate channels. These channels are set aside for narrow bandwidth systems and should be used only if all other channels are blocked.

/2/ In congested areas where 40 MHz channels block most 30 MHz channels, radios authorized for 30 MHz bandwidths may use the 40 MHz channels. In uncongested areas, 30 MHz channels should be used.

(i) 17,700 to 19,700 MHz. Applicants may use either a two-way link or one frequency of a frequency pair for a one-way link and must coordinate proposed operations pursuant to the procedures required in § 101.103. (Note, however, that stations authorized as of September 9, 1983 to use frequencies in the band 17.7-19.7 GHz may, upon proper application, continue to be authorized for such operations.)

(1) 2 MHz maximum authorized bandwidth channel:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
18141.0	n/a

(2) 5 MHz maximum authorized bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
18762.5	19102.5

18767.5	19107.5
18772.5	19112.5
18777.5	19117.5
18782.5	19122.5
18787.5	19127.5
18792.5	19132.5
18797.5	19137.5
18802.5	19142.5
18807.5	19147.5
18812.5	19152.5
18817.5	19157.5

(3) 6 MHz maximum authorized bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
18145.0	n/a
18151.0	18367.0
18157.0	18373.0
18163.0	18379.0
18169.0	18385.0
18175.0	18391.0
18181.0	18397.0
18187.0	18403.0
18193.0	18409.0
18199.0	18415.0
18205.0	18421.0
18211.0	18427.0
18217.0	18433.0
18223.0	18439.0
18229.0	18445.0
18235.0	18451.0
18241.0	18457.0
18247.0	18463.0
18253.0	18469.0
18259.0	18475.0
18265.0	18481.0
18271.0	18487.0
18277.0	18493.0
18283.0	18499.0
18289.0	18505.0
18295.0	18511.0
18301.0	18517.0
18307.0	18523.0
18313.0	18529.0
18319.0	18535.0
18325.0	18541.0
18331.0	18547.0
18337.0	18553.0

18343.0	18559.0
18349.0	18565.0
18355.0	18571.0
18361.0	18577.0

(4) 10 MHz maximum authorized bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
17705.0	19265.0
17715.0	19275.0
17725.0	19285.0
17735.0	19295.0
17745.0	19305.0
17755.0	19315.0
17765.0	19325.0
17775.0	19335.0
17785.0	19345.0
17795.0	19355.0
17805.0	19365.0
17815.0	19375.0
17825.0	19385.0
17835.0	19395.0
17845.0	19405.0
17855.0	19415.0
17865.0	19425.0
17875.0	19435.0
17885.0	19445.0
17895.0	19455.0
17905.0	19465.0
17915.0	19475.0
17925.0	19485.0
17935.0	19495.0
17945.0	19505.0
17955.0	19515.0
17965.0	19525.0
17975.0	19535.0
17985.0	19545.0
17995.0	19555.0
18005.0	18565.0
18015.0	19575.0
18025.0	19585.0
18035.0	19595.0
18045.0	19605.0
18055.0	19615.0
18065.0	19625.0
18075.0	19635.0
18085.0	19645.0
18095.0	19655.0
18105.0	19665.0

18115.0	19675.0
18125.0	19685.0
18135.0	19695.0
18585.0	18925.0
18595.0	18935.0
18605.0	18945.0
18615.0	18955.0
18625.0	18965.0
18635.0	18975.0
18645.0	18985.0
18655.0	18995.0
18665.0	19005.0
18675.0	19015.0
18685.0	19025.0
18695.0	19035.0
18705.0	19045.0
18715.0	19055.0
18725.0	19065.0
18735.0	19075.0
18745.0	19085.0
18755.0	19095.0
18765.0	19105.0
18775.0	19115.0
18785.0	19125.0
18795.0	19135.0
18805.0	19145.0
18815.0	19155.0

(5) 20 MHz maximum authorized bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
17710.0	19270.0
17730.0	19290.0
17750.0	19310.0
17770.0	19330.0
17790.0	19350.0
17810.0	19370.0
17830.0	19390.0
17850.0	19410.0
17870.0	19430.0
17890.0	19450.0
17910.0	19470.0
17930.0	19490.0
17950.0	19510.0
17970.0	19530.0
17990.0	19550.0
18010.0	19570.0
18030.0	19590.0
18050.0	19610.0

18070.0	19630.0
18090.0	19650.0
18110.0	19670.0
18130.0	19690.0
18590.0	18930.0
18610.0	18950.0
18630.0	18970.0
18650.0	18990.0
18670.0	19010.0
18690.0	19030.0
18710.0	19050.0
18730.0	19070.0
18750.0	19090.0
18770.0	19110.0
18790.0	19130.0
18810.0	19150.0

(6) 40 MHz maximum authorized bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
17720.0	19280.0
17760.0	19320.0
17800.0	19360.0
17840.0	19400.0
17880.0	19440.0
17920.0	19480.0
17960.0	19520.0
18000.0	19560.0
18040.0	19600.0
18080.0	19640.0
18120.0	19680.0

(7) 80 MHz maximum authorized bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
17740.0	19300.0
17820.0	19380.0
17900.0	19460.0
17980.0	19540.0
18060.0	19620.0

(8) 220 MHz maximum authorized bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)

17810.0	18470.0
18030.0	19370.0
18250.0	19590.0

(j) 31.0 to 31.3 GHz. These frequencies are shared on a co-equal basis with other stations in the fixed and mobile services (see Parts 74, 95, and 101). No interference protection is afforded to fixed or mobile stations operating in this band.

(1) 25 MHz authorized bandwidth channels, 150 MHz separation.

Transmit (receive) (MHz)	Receive (transmit) (MHz)
31,012.5	31,162.5
31,037.5	31,187.5
31,062.5	31,212.5
31,087.5	31,237.5
31,112.5	31,262.5
31,137.5	31,287.5

(2) 50 MHz authorized bandwidth channels, 150 MHz separation.

Transmit (receive) (MHz)	Receive (transmit) (MHz)
31,025.0	31,175.0
31,075.0	31,225.0
31,125.0	31,275.0

(k) Assignments in the band 38,600-40,000 MHz must be according to the following frequency plan:

Channel group A		Channel group B	
Channel No.	Frequency band limits MHz	Channel No.	Frequency band limits MHz
1-A	38,600-38,650	1-B	39,300-39,350
2-A	38,650-38,700	2-B	39,350-39,400
3-A	38,700-38,750	3-B	39,400-39,450
4-A	38,750-38,800	4-B	39,450-39,500
5-A	38,800-38,850	5-B	39,500-39,550
6-A	38,850-38,900	6-B	39,550-39,600
7-A	38,900-38,950	7-B	39,600-39,650
8-A	38,950-39,000	8-B	39,650-39,700
9-A	39,000-39,050	9-B	39,700-39,750
10-A3	9,050-39,100	10-B	39,750-39,800
11-A	39,100-39,150	11-B	39,800-39,850
12-A	39,150-39,200	12-B	39,850-39,900

13-A	39,200-39,250	13-B	39,900-39,950
14-A	39,250-39,300	14-B	39,950-40,000

These channels are assigned for use within a rectangular service area to be described in the application by the maximum and minimum latitudes and longitudes. Such service area must be as small as practicable consistent with the local service requirements of the carrier. These frequency plans may be subdivided as desired by the licensee and used within the service area as desired without further authorization subject to the terms and conditions set forth in § 101.723. These frequencies may be assigned only where it is shown that the applicant will have a reasonable projected requirement for a multiplicity of service points or transmission paths within the area.

(l) Fixed systems licensed, in operation, or applied for in the 5925-6425, 10,550-10,680, and 10,700-11,700 MHz bands prior to July 15, 1993 are permitted to use channel plans in effect prior to that date, including adding channels under those plans.

(m) In the 3700-4200, 5925-6425, 6525-6875, 10,550-10,680, and 10,700-11,700 MHz bands point-to-point operations on other than the listed frequencies may be authorized where it is shown that the objectives or requirements of the interference criteria prescribed in § 101.105 could not otherwise be met to resolve the interference problems.

§ 101.705 Transmitter power.

Stations in this service may not be authorized to use transmitters having a rated power output in excess of the limits set forth in § 101.113(b) and a standby transmitter having a rated power output in excess of that of the main transmitter with which it is associated will not be authorized.

§ 101.707 Bandwidth and emission limitations.

(a) The maximum bandwidth authorized may not exceed that reasonably necessary to provide the proposed service but in no event may it exceed the limits set forth below:

Frequency band (MHz)	Maximum authorized bandwidth (MHz)
932.5 to 935	0.2
941.5 to 944	0.2
2,110 to 2,130	3.5
2,160 to 2,180	3.5
3,700 to 4,200	20.0
5,925 to 6,425	30.0
6,525 to 6,875	10.0
10,550 to 10,680	5.0
10,700 to 11,700	40.0
13,200 to 13,250	25.0
17,700 to 18,580	220.0
18,580 to 18,820	20.0
18,820 to 18,920	10.0
18,920 to 19,160	20.0
19,160 to 19,260	10.0
19,260 to 19,700	220.0

21,200 to 22,000	100.0
22,000 to 23,600	100.0
27,500 to 29,500	220.0
31,000 to 31,300	25.0 or 50.0
38,600 to 40,000	50.0

(b) The bandwidths authorized on frequencies above 500 MHz must be appropriate to the type of operation in any particular case. An application requesting such authorization must fully describe the modulation, emission, and bandwidth desired and must specify the bandwidth to be occupied.

§ 101.709 Modulation requirements.

When amplitude modulation is used, the modulation percentage must be sufficient to provide efficient communication, and must normally be maintained above 70 percent on positive peaks but may not exceed 100 percent on negative peaks.

§ 101.711 Permissible communications.

Stations in this service are authorized to render any kind of communication service provided for in the legally applicable tariffs of the carrier, unless otherwise directed in the applicable instrument of authorization or limited by § 101.703 or § 101.707.

§ 101.713 Supplementary showing required with applications.

(a) All applicants for regular authorization under this subpart must, before filing an application, amendments to a pending application or modifications to a license, prior coordinate the proposed frequency usage with existing users in the area and other applicants with previously filed applications in accordance with the procedures in § 101.103 except that stations authorized under § 101.715 may complete the prior coordination process orally and the period allowed for response to a coordination notification may be less than 30 days if the parties agree.

(b) In those frequency bands shared with the communication-satellite service and applicant for a new station, for new points of communication, for the initial frequency assignment in a shared band for which coordination has not been previously effected, or for authority to modify the emission or radiation characteristics of an existing station in a manner that may increase the likelihood of harmful interference, must ascertain in advance whether the station(s) involved lie within the great circle coordination distance contours of an existing Earth station or one for which an application has been accepted for filing, and must coordinate his proposal with each such Earth station operator or applicant. For each potential interference path, the applicant must perform the computations required to determine that the expected level of interference to or from the terrestrial station does not exceed the maximum permissible interference power level in accordance with the technical standards and requirements of Secs. 25.251-25.256 of this chapter. In those instances where the results of these computations indicate a safety margin of less than 5 dB, the applicant must submit with the application to the Commission, certain additional information; the gains assumed for both the terrestrial and Earth station antennas in the direction of the other station; the calculated transmission loss; and the resulting margin above the controlling objective. The Commission may, in the course of examining any application, require the submission of additional showings, complete with pertinent data and calculations in accordance with Part 25 of this chapter, showing that harmful interference will not likely result from the proposed operation. (Technical characteristics of the Earth stations on file and coordination contour maps for those Earth stations will be kept on file for public inspection in the offices of the Commission's Common Carrier Bureau in Washington, D.C.)

(c) Each applicant filing pursuant to paragraph (c) of this section must also ascertain in advance whether the beam of his proposed antenna(s) intersects the beam of any Earth station antenna within the rain scatter coordination distance contour of which the terrestrial antenna is located, below the altitude given in table 1 of Sec. 25.254(b) of this chapter for the rain climate in which the Earth station is located. In general such intersections will not be permitted. For the purposes of this paragraph, the beam of an antenna is to be taken as that portion of the antenna radiation pattern inside of which the gain is within 15 dB of the maximum antenna gain. The concepts of rain climate and rain scatter coordination distance contour are as defined in Sec. 25.254 of this chapter. In certain cases, for good cause shown, intersections may be permitted on an individual waiver basis. In such cases, the applicant must also submit with his application a showing setting forth (1) the nature of the proposed beam intersection, (2) the Earth station operator or applicant with whom coordination was attempted and the results of the coordination, and (3) the technical basis on which it was concluded that harmful interference will not likely result from this beam intersection.

§ 101.715 Stations at temporary fixed locations.

(a) Authorizations may be issued upon proper application for the use of frequencies listed in § 101.703(a) by stations in the Point-to-Point Microwave Radio Service for rendition of temporary service to subscribers under the following conditions:

(1) When a fixed station is to remain at a single location for less than six months, the location is considered to be temporary. Services which are initially known to be of longer than 6 months' duration may not be provided under a temporary fixed authorization but rendered pursuant to a regular license.

(2) When a fixed station, authorized to operate at temporary locations, is to remain at a single location for more than six months, an application (FCC Form 494) for a station authorization designating that single location as the permanent location must be filed at least 30 days prior to the expiration of the six-month period.

(3) The station must be used only for rendition of communication service at a remote point where the provision of wire facilities is not practicable.

(4) The antenna structure height employed at any location may not exceed the criteria set forth in Sec. 17.7 of this chapter unless, in each instance, authorization for use of a specific maximum antenna structure height for each location has been obtained from the Commission prior to erection of the antenna. See § 101.125.

(b) Applications for authorizations to operate stations at temporary locations under the provisions of this section must be made upon FCC form 494. Blanket applications may be submitted for the required number of transmitters.

§ 101.717 Notification of station operation at temporary fixed locations.

(a) The licensee of stations which are authorized pursuant to the provisions of § 101.715 must notify the Commission at least 5 days prior to installation of the facilities, stating:

(1) The call sign, manufacturer's name, type or model number, output power and specific location of the transmitter(s).

(2) The maintenance location for the transmitter.

(3) The location of the transmitting or receiving station with which it will communicate and the identity of the correspondent operating such facilities.

(4) The exact frequency or frequencies to be used.

(5) The public interest, convenience and necessity to be served by operation of the proposed installation.

(6) The commencement and anticipated termination dates of operation from each location. In the event the actual termination date differs from the previous notification, written notice thereof promptly must be given to the Commission.

(7) A notification must include compliance with the provisions of § 101.713 (c) when operations are to be conducted in the area of other terrestrial microwave stations and with the provisions of § 101.713(c) and
(d) when operations are to be conducted within the coordination distance contours of a fixed earth station.

(8) Where the notification contemplates initially a service which is to be rendered for a period longer than 90 days, the notification must contain a showing as to why application should not be made for regular authorization.

(b) Less than 5 days advance notice may be given when circumstances require shorter notice provided such notice is promptly given and the reasons in support of such shorter notice are stated.

(c) A copy of the notification must be kept with the station license.

§ 101.719 Renewal of station licenses.

(a) An application for renewal of a station license in the Point-to-Point Microwave Radio Service primarily used to relay television signals must contain:

(1) A statement that such use complies with § 101.701(b); and

(2) The demonstration required by § 101.701(c). Applications that do not contain these items as appropriate will be returned as unacceptable for filing.

(b) Any application for renewal of license, for a term commencing January 1, 1975, or after, involving facilities utilizing frequency diversity must contain a statement showing compliance with § 101.103(c) or the exceptions recognized in paragraph 141 of the "First Report and Order" in Docket No. 18920 (FCC 71-547). If not in compliance, a complete statement with the reasons therefor must be submitted.

§ 101.721 Channel loading.

.Except for video transmission, an application for an initial working channel for a given route will not be accepted for filing where the anticipated loading (within 30 months for data and five years for voice, or other period subject to reasonable projection) is less than the minimum specified for the following frequency bands. Absent extraordinary circumstances, applications proposing additional frequencies over existing routes will not be granted unless it is shown that the traffic load will shortly exhaust the capacity of the existing equipment. For the 3700-4200 MHz band, all persons intending to utilize baseband frequencies above 7.3 MHz, or to operate with more than 1500 equivalent 4 kHz voice channels per radio channel, must submit evidence of coordination pursuant to § 101.103(d). Where no construction of radio facilities is requested, licensees must submit this evidence with their filing of any necessary authority required pursuant to section 214 of the Communications Act and Part 63 of this chapter.

Frequency band (MHz)	Minimum number of voice channels (4 kHz or equivalent)	Minimum original data loading (Mb/s)
3700 to 4200 (20 MHz bandwidth)	900*	44.7
5925 to 6425 (10 MHz bandwidth)		22.3
5925 to 6425		44.7

(20 MHz bandwidth)		
5925 to 6425	900*	67.0
(30 MHz bandwidth)		
10,700 to 11,700		
(10 MHz bandwidth)	240	22.3
10,700 to 11,700		
(20 MHz bandwidth)	240	44.7
10,700 to 11,700		
(30 MHz bandwidth)	900*	44.7
10,700 to 11,700		
(40 MHz bandwidth)	900*	67.0

* Where transmitters employing digital modulation techniques are designed to be used so that two may simultaneously operate on the same frequency over the same path, the minimum number of voice channels is reduced to 500 per transmitter.

§ 101.723 Special requirements for operation in the band 38,600-40,000 MHz.

Assigned frequency channels in the band 38,600-40,000 MHz may be subdivided and used anywhere in the authorized service area, subject to the following terms and conditions:

(a) No interference may be caused to a previously existing station operating in another authorized service area.

(b) Each operating station must have posted a copy of the service area authorization.

(c) The antenna structure height employed at any location may not exceed the criteria set forth in Sec. 17.7 of this chapter unless, in each instance, authorization for use of a specific maximum antenna structure for each location has been obtained from the FAA prior to the erection of the antenna.

Subpart J--Local Television Transmission Service

§ 101.800 Eligibility.

Authorizations for stations in this service will be granted to existing and proposed communication common carriers. Applications will be granted only in cases where it is shown that (a) the applicant is legally, financially, technically and otherwise qualified to render the proposed service, (b) there are frequencies available to enable the applicant to render a satisfactory service, and (c) the public interest, convenience or necessity would be served by a grant thereof.

§ 101.801 Frequencies.

(a) Frequencies in the following bands are available for assignment to television pickup and television non-broadcast pickup stations in this service:

6,425 to 6,525 MHz./6/
11,700 to 12,200 MHz./3/
13,200 to 13,250 MHz./1/
14,200 to 14,400 MHz.
21,200 to 22,000 MHz./1,/2/,/4/,/5/
22,000 to 23,600 MHz./1/,/2/,/5/
31,000 to 31,300 MHz./7/

/1/ This frequency band is shared with fixed and mobile stations licensed under this and other parts of the Commisssion's Rules.

/2/ This frequency band is shared with Government stations.

/3/ This frequency band is shared, on a secondary basis, with stations in the broadcasting-satellite and fixed-satellite services.

/4/ This frequency band is shared with stations in the earth-exploration satellite service.

/5/ Assignments to common carriers in this band are normally made in the segments 21,200-21,800 MHz and 22,400-23,800 MHz and to operational fixed users in the segments 21,800-22,400 MHz and 23,000-23,600 MHz. Assignments may be made otherwise only upon a showing that interference free frequencies are not available in the normally assigned band segments. The maximum power for the local television transmission service in the 14.2-14.4 GHz band is +45 dBW except that operations are not permitted within 1.5 degrees of the geostationary orbit.

/6/ This band is co-equally shared with mobile stations licensed pursuant to Parts 74 and 78, and Subpart H of this part of the Commission's rules.

/7/ Use of this spectrum for direct delivery of video programs to the general public or multi-channel cable distribution is not permitted.

(b) Communications common carriers in the Local Television Transmission Service may be assigned frequencies listed in Secs. 74.602(a), 78.18(a)(7) and 78.18(a)(8) to provide service to television

broadcast stations, television broadcast network-entities, cable system operators and cable network-entities. Frequency availability is subject to the provisions of Sec. 74.604 and the use of the facility is limited to the permissible uses described in Secs. 74.631 and 78.11. Operations on these frequencies are subject to the technical provisions of Part 74, Subpart F, and Part 78, Subpart D of this chapter.

(c) [Reserved]

(d) Frequencies in the following bands are available for assignment to television STL stations in this service:

3,700 to 4,200 MHz /1/
5,925 to 6,425 MHz /1/, /5/
10,700 to 11,700 MHz /1/, /6/
13,200 to 13,250 MHz /2/
21,200 to 22,000 MHz /2/, /4/, /7/, /8/
22,000 to 23,600 MHz /2/, /6/, /8/
31,000 to 31,300 MHz /9/

/1/ This frequency band is shared with stations in the Point to Point Microwave Radio Service and, in United States Possessions in the Caribbean area, with stations in the International Fixed Radiocommunications Services.

/2/ This frequency band is shared with fixed and mobile stations licensed under this and other parts of the Commission's rules.

/3/ This frequency band is shared with space stations (space to earth) in the fixed-satellite service.

/4/ This frequency band is shared with Government stations.

/5/ This frequency band is shared with earth stations (earth to space) in the fixed-satellite services.

/6/ The band segments 10.95-11.2 and 11.45-11.7 GHz are shared with space stations (space to earth) in the fixed-satellite service.

/7/ This frequency band is shared with space stations (space to earth) in the earth exploration satellite service.

/8/ Assignments to common carriers in this band are normally made in the segments 21,200-21,800 MHz and 22,400-23,000 MHz and to operational fixed users in the segments 21,800-22,400 MHz and 23,000-23,600 MHz. Assignments may be made otherwise only upon a showing that interference free frequencies are not available in the appropriate band segments.

/9/ Frequencies in this band are co-equally shared with stations in the Auxiliary Broadcasting (Part 74), Cable Television Relay (Part 78), Private Operational-Fixed Microwave (Subpart H) and General Mobile Radio (Part 95) Services.

(e) 31.0 to 31.3 GHz. These frequencies are shared on a co-equal basis with other stations in the fixed and mobile services (see Parts 74, 78, and 95, and Subpart H). No interference protection is afforded to fixed or mobile stations operating in this band.

(1) 25 MHz authorized bandwidth channels, 150 MHz separation.

Transmit (receive) (MHz)	Receive (transmit) (MHz)
31,012.5	31,162.5
31,037.5	31,187.5
31,062.5	31,212.5
31,087.5	31,237.5
31,112.5	31,262.5
31,137.5	31,287.5

(2) 50 MHz authorized bandwidth channels, 150 MHz separation.

Transmit (receive) (MHz)	Receive (transmit) (MHz)
31,025.0	31,175.0
31,075.0	31,225.0
31,125.0	31,275.0

(f) On the condition that harmful interference will not be caused to services operating in accordance with the Table of Frequency Allocations, persons holding valid station authorizations on July 15, 1963, to provide television nonbroadcast pickup service in the 6525-6575 MHz band may be authorized to continue use of the frequencies specified in their authorization for such operations until July 15, 1968.

(g) 6425 to 6525 MHz–Mobile Only. Paired and un-paired operations permitted. Use of this spectrum for direct delivery of video programs to the general public or for multi-channel cable distribution is not permitted. This band is co-equally shared with mobile stations licensed pursuant to Parts 74 and 78 of the Commission's Rules. The following channel plans apply.

(1) 1 MHz maximum authorized bandwidth channels.

Transmit (or receive) (MHz)	Receive (or transmit) (MHz)
6425.5	6475.5
6450.5	6500.5

(2) 8 MHz maximum authorized bandwidth channels.

Transmit (or receive) (MHz)	Receive (or transmit) (MHz)
6430.0	6480.0
6438.0	6488.0
6446.0	6596.0
6455.0	6505.0

6463.0	6513.0
6471.0	6521.0

(3) 25 MHz maximum authorized bandwidth channels.

Transmit (or receive) (MHz)	Receive (or transmit) (MHz)
6437.5	6487.5
6462.5	6512.5

(h) The frequency 27.255 MHz in the 27.23-27.28 MHz band is allocated for assignment to microwave auxiliary stations in this service on a shared basis with other radio services. Assignments to stations on this frequency will not be protected from such interference as may be experienced from the emissions of industrial, scientific and medical equipment operating on 27.12 MHz in accordance with Sec. 2.106 of this chapter.

§ 101.802 Assignment of frequencies to mobile stations.

The assignment of frequencies to mobile stations in this service will not be limited to a single licensee within any area. However, geographical limits within which mobile units may operate may be imposed by the Commission.

§ 101.803 Transmitter power.

Stations in this service will not be authorized to use transmitters having a rated power output in excess of the limits set forth in § 101.113(b) and a standby transmitter having a rated power output in excess of that of the main transmitter with which it is associated will not be authorized.

§ 101.804 Bandwidth and emission limitations.

(a) Stations in this service operating on frequencies in the 27.23-27.28 MHz band will be authorized to employ only amplitude modulated or frequency modulated emission for radiotelephony. The authorization to use such emissions will be construed to include authority to employ unmodulated emission only for temporary or short periods necessary for equipment testing incident to the construction and maintenance of the station.

(b) Stations in the service operating on frequencies above 940 MHz may be authorized to use amplitude modulated, frequency modulated or pulse type of emission for radiotelephony and television. In addition, the use of unmodulated emission may be authorized in appropriate cases.

(c) The maximum bandwidths which will normally be authorized for single channel operation on frequencies below 500 MHz in this service must not exceed the limits set forth below:

Type of emission	Authorized bandwidth (kHz)
A3E	8
F3E or (G3E)	40

(d) Maximum bandwidths in the following frequency bands must not exceed the limits set forth below:

Frequency band (MHz)	Maximum authorized bandwidth (MHz)
3,700 to 4,200	20
5,925 to 6,425	30
6,425 to 6,525	25
10,700 to 12,200	40
13,200 to 13,250	25
22,000 to 23,600	100

(e) The bandwidths authorized on frequencies above 500 MHz must be appropriate to the type of operation in any particular case. An application requesting such authorization must fully describe the modulation, emission, and bandwidth desired and must specify the bandwidth to be occupied.

§ 101.805 Modulation requirements.

(a) The use of modulating frequencies higher than 3000 hertz for single channel radiotelephony or tone signaling on frequencies below 500 MHz is not authorized.

(b) When amplitude modulation is used, the modulation percentage must be sufficient to provide efficient communication and must normally be maintained above 70 percent on positive peaks, but may not exceed 100 percent on negative peaks.

(c) When phase or frequency modulation is used for single channel radiotelephony on frequencies below 500 MHz, the deviation arising from modulation may not exceed plus or minus 15 kHz from the unmodulated carrier.

(d) Each unmultiplexed radiotelephone transmitter having more than 3 watts plate power input to the final radio frequency stage and initially installed at the station in this service after September 4, 1956, must be provided with a device that will automatically prevent modulation in excess of that specified in paragraphs (b) and (c) of this section which may be caused by greater than normal audio level.

§ 101.806 Remote control operation of mobile television pickup stations.

(a) Mobile television pickup stations (including nonbroadcast) may be operated by remote control from the fixed locations for periods not to exceed 6 months.

(b) The Commission may, upon adequate showing by the licensee as to why the television pickup operations should not be conducted under a fixed station authorization, renew the authority granted under the provisions of paragraph (a) of this section.

(c) Reference should be made to § 101.125 concerning mobile station antenna height restrictions and to paragraphs (c) and (f) of § 101.131 concerning control points.

§ 101.807 Stations at temporary fixed locations.

(a) Authorizations may be issued upon proper application for the use of frequencies listed in Sec. 101.803

by stations in the Local Television Transmission Service for rendition of temporary service to subscribers under the following conditions:

(1) When a fixed station is to remain at a single location for less than 6 months, the location is considered to be temporary. Services that are initially known to be of longer than 6 months' duration may not be provided under a temporary fixed authorization but rendered pursuant to a regular license.

(2) When a fixed station authorized to operate at temporary locations is installed and it subsequently becomes necessary for the station to operate from such location for more than six months, application FCC Form 494 for a station authorization to specify the permanent location must be filed at least thirty days prior to the expiration of the six month period.

(3) The station must be used only for rendition of communication service at a remote point where the provision of wire facilities is not practicable.

(4) The antenna structure height employed at any location may not exceed the criteria set forth in § 17.7 of this chapter unless, in each instance, authorization for use of a specific maximum antenna structure height for each location has been obtained from the Commission prior to erection of the antenna. See § 101.125.

(5) Applications for such stations must comply with the provisions of § 101.713.

(b) Applications for authorizations to operate stations at temporary locations under the provisions of this section may be made upon FCC Form 494. Blanket applications may be submitted for the required number of transmitters.

(c) Prior coordination of mobile assignments will be in accordance with the procedures in § 101.103(d) except that the prior coordination process for mobile (temporary fixed) assignments may be completed orally and the period allowed for response to a coordination notification may be less than 30 days if the parties agree.

§ 101.808 Notification of station operation at temporary locations.

(a) The licensee of stations authorized pursuant to § 101.813 must notify the Commission prior to each period of operation. This notification may be oral or written and must include:

(1) The call sign, manufacturer's name, type or model number, output power and specific location of the transmitter(s).

(2) The maintenance location for the transmitter.

(3) The location of the transmitting or receiving station with which it will communicate and the identity of the correspondent operating such facilities.

(4) The exact frequency or frequencies to be used.

(5) The public interest, convenience and necessity to be served by operation of the proposed installation.

(6) The commencement and anticipated termination dates of operation from each location. In the event the actual termination date differs from the previous notification, written notice thereof promptly must be given to the Commission.

(7) Where the notification contemplates initially a service that is to be rendered for a period longer than 90 days, the notification must contain a showing as to why application should not be made for regular authorization.

(8) A notification must include compliance with the provisions of § 101.813(c).

(b) A copy of the notification must be kept with the station license.

§ 101.809 Stations affected by coordination contour procedures.

In frequency bands shared with the communication-satellite service, applicants must also comply with the requirements of § 101.713.

APPENDIX B

Cross Reference Table

Present Section	Proposed Section
Subpart A–General	
21.1	101.1
21.2	101.3
Subpart B–Applications and Licenses	
21.3	101.5
21.4	101.7
21.5	101.9
21.6	101.11
21.7	101.15
21.8–21.10	Deleted.
21.11	101.15
21.12	Deleted.
21.13	101.19
21.14	Deleted.
21.15	101.21
21.16	Deleted.
21.17	Deleted.
21.18	Deleted.
21.19	101.23
21.20	101.35
21.21	101.25
21.22	101.27
21.23	101.29
21.24	Deleted.
21.25	101.31
21.26	101.35
21.27	101.37
21.28	101.39
21.29	101.41
21.30	101.43
21.31	101.45
21.32	101.47
21.33	101.49
21.34	Deleted.
21.35	101.51
21.36–21.37	Deleted.
21.38	101.53
21.39	101.55
21.40	101.57
21.41	101.59
21.42	101.61
21.43	101.63
21.44	101.65
21.45	101.67
21.50	101.69

Present Section	Proposed Section
Subpart C–Technical Standards	
21.100	101.103
21.101	101.107
21.102–21.104	Deleted.
21.105	101.109
21.106	101.111
21.107	101.113
21.108(a)-(d)	101.115(a)-(d)
21.108(e)	101.145
21.109	Deleted.
21.110	101.117
21.111	101.119
21.112	101.121
21.113	101.123
21.114	101.125
21.115	Deleted.
21.116	101.127
21.117	101.129
21.118	101.131
21.119	101.133(a)
21.120	101.139
21.121	Deleted.
21.122	101.141
Subpart D–Technical Operations	
21.200	101.201
21.201	Deleted.
21.202–21.208	Deleted.
21.209	101.205
21.210	101.207
21.211	101.209
21.212–21.213	Deleted.
21.214	101.211
Subpart E–Miscellaneous	
21.300	Deleted.
21.301	101.301

21.302	101.303
21.303	101.305
21.304	101.307
21.305	Deleted.
21.306	101.309
21.307	101.311

Present Section	Proposed Section
Subpart F–Developmental Authorizations	
21.400	101.401
21.401	101.403
21.402	101.405
21.403	101.407
21.404	101.409
21.405	101.411
21.406	101.413
Subpart G–Digital Electronic Message Service	
21.500	101.501
21.501	101.503
21.502	101.505
21.503	101.507
21.504	101.509
21.505	101.511
21.506	101.513
21.507	101.515
21.508	101.517
21.509	101.519
21.510	101.521
21.511	101.523
Subpart H–[Reserved]	
Subpart I–Point-to-Point Microwave Radio Service	
21.700	101.701
21.701	101.703
21.702	101.705
21.703	101.707
21.704	101.709
21.705	101.711
21.706	101.713
21.707	101.715
21.708	101.717
21.709	101.719
21.710(a-c)	101.145
21.710(d)	101.721
21.711	101.723
21.713	Deleted
Subpart J–Local Television Transmission Service	
21.800	101.801
21.801	101.803
21.802	101.805
21.803	101.807

Present Section	Proposed Section
21.804	101.807
21.805	101.809
21.806	101.811
21.807	101.813
21.808	101.815
21.809	101.817
Subpart K–Multipoint Distribution Service [This Subpart retained in Part 21]	
Part 94	
Subpart A–General Information	
94.1	101.1
94.3	101.3
94.5	101.601
94.7	101.7(a)
94.9	101.603
94.11(a)	101.133(b)
94.11(b)	101.205
94.13	101.137
94.15(a)	101.103(a)
94.15(b)-(d)	Deleted.
94.15(e)	101.605
94.15(f)	101.605
94.15(g)	101.605
94.15(h)	Deleted.
94.15(i)(j)	Deleted.
94.17	101.135
94.19	101.133(c)
Subpart B–Applications, Authorizations, and Notifications	
94.23	101.5(a)
94.25(a)(b)	101.11
94.25(d)	101.13(b)
94.25 (e)	101.13(c)
94.25(f)	101.125
94.25(h)	101.603(b)(3)

94.25(i)	101.123
94.25(j)	101.13(f)
94.25(k)	101.101
94.27	101.13
94.29	101.33
94.31(a)	101.19(c)
94.31(b)(c)	Deleted.
94.31(d)	101.411
94.31(e)	101.13(b)

Present Section	Proposed Section
94.31(f)	101.19(c)
34.31(g)	Deleted.
34.31(h)	101.121
94.31(i)	101.5(c)
94.31(j)	Deleted.
94.31(k)	101.605(a)
94.33	101.35
94.35(a)	Deleted.
94.35(b)	101.39(a)
94.37	101.47
94.39(a)	101.67(d)
94.39(b)	101.409
94.41	101.47(d)
94.43	101.31
94.45	101.57(d)(e)
94.47(a)	101.53(a)
94.47(b)	101.55(b)
94.49	Deleted.
94.51	101.63
94.53	101.65(d)
94.57	Deleted.
94.59	101.69
Subpart C–Technical Standards	
94.61	101.101
94.63	101.105
94.65	101.605
94.67	101.107
94.69	101.109(b)
94.71(a)	101.109(a)
94.71(b)	
94.71(c)-(e)	101.111
94.73	101.113
94.75(a)(b)	101.115
94.75(c)	Deleted.
94,75(d)-(f)	101.115
94.75 (g)	Deleted.
94.75(h)	101.517
94.77(a)	101.145
94.79	101.143
94.81	101.139

Present Section	Proposed Section
94.83	101.131(a)
94.85	Deleted.
94.88	101.605(l)(3)
94.90	101.605(j)(B)
94.91	101.605(m)
94.92	101.609
94.93	101.605
94.94	101.141(e)
94.95	Deleted.
Subpart D–Station Operating Requirements	
94.101	101.209
94.103	101.213
94.105	101.215
94.107	Deleted.
94.109	101.201
94.111	101.121
94.113	Deleted.
Subpart E–Developmental Operation	
94.151	101.401
94.153	101.407
94.155	101.405
94.157	101.409(b)
94.159	101.409(b)
94.161	101.409
94.163	101.411
94.165	101.413